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# DIVISION AND SALE, ACTION OF.

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### SECTION 1.—NATURE OF ACTION.

1. The right of joint owners of heritable property, such as joint disponees, adjudgers, and heirs-portioners, to sue for division, or alternatively for sale, of the subjects, is traceable to the *actio communi dividundo* of the Roman Law. "That law and our common law following upon it proceed upon the principle that no one should be bound to remain *in communione* with another or others as proprietors of common property: that for reasons of public policy and especially to ensure the advantageous management of such property, any joint proprietor should have it in his power, against the will of the others, to put an end to the communion; and that there arises out of the situation itself an obligation to divide, or, where division or any other arrangement is impracticable consistently with retaining the property, to adjust their respective interests by sale, and division of the price."<sup>1</sup> The procedure used formerly to be by brieve of division directed to the Sheriff, and tried by him and a jury. It was not retourable to Chancery. This has now been superseded by the action of declarator and division, or sale where it is impossible or undesirable that the subjects should be divided.

### SECTION 2.—TITLE TO SUE OR DEFEND.

2. Any joint *pro indiviso* owner may raise the action, even although the deed constituting the right forbids a division or sale.<sup>2</sup> He cannot be compelled to shew cause for his demand.<sup>3</sup> The defenders are the other *pro indiviso* proprietors. The fact that one of the *pro indiviso*

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GENERAL AUTHORITIES.—Stair, i. 16, 4; iv. 3, 12; Ersk. iii. 3, 56; iii. 8, 13; Shand, Practice, p. 604; Mackay, Manual, p. 504; Maclaren, Court of Session Practice, p. 776; Lewis, Sheriff Court Practice, 7th ed., p. 465; Rankine on Land-Ownership, 4th ed., pp. 591, 603; Bell, Convey. ii. 831.

<sup>1</sup> *Milligan v. Barnhill*, 1782, Mor. 2486; *Bryden v. Gibson*, 1837, 15 S. 486; *Brock v. Hamilton*, 1852, 19 D. 701, per Lord Rutherford.

<sup>2</sup> *Grant v. Heriot's Trust*, 1906, 8 F. 647, per Lord Pres. Dunedin at p. 658.

<sup>3</sup> *Frizell v. Thomson*, 1860, 22 D. 1176.

owners holds in trust does not affect his right to sue for division, nor for sale, even although there is no power of sale in the deed under which he acts. It is not an exercise of a power of sale, but merely an act of administration.<sup>1</sup> But trustees who hold heritable subjects cannot, along with some of the beneficiaries, bring an action of division against the other beneficiaries unless the trust has failed, and the beneficiaries are absolutely entitled to be rid of it. The proper remedy is an application for authority to sell under the Trusts Acts.<sup>2</sup> The process of division may also be used for the division of a warranty. See COMMON PROPERTY AND COMMON INTEREST.<sup>3</sup>

### SECTION 3.—JURISDICTION.

3. The action may, of course, be brought in the Court of Session. It may also competently be raised in the Sheriff Court;<sup>4</sup> but if the value of the subjects in dispute exceeds £50 per annum, or £1000 in all, either party may, at the closing of the record, or within six days thereafter, require the cause to be remitted to the Court of Session.<sup>4</sup> The action must be raised in the Sheriff Court of the jurisdiction and district where the property forming the subject in dispute is situated.<sup>4</sup>

### SECTION 4.—PROCEDURE.

4. In the Court of Session the procedure takes place before the Lord Ordinary. It is not an Inner House action, as it does not involve any exercise of the *nobile officium*.<sup>5</sup> Where the action is defended, the procedure up to the closing of the record is that of an ordinary action. Where the defences are repelled or the action is undefended the Lord Ordinary finds the libel relevant. Whether the action is defended or not, a remit is made to a practical man (usually an architect) to report on a scheme of division. Objections and answers to the report may be lodged, and the parties may be heard upon the scheme. When the parties cannot agree which share each is to take, the matter is usually settled by lot. The division may be effected by means of mutual conveyances, or recourse may be had to the provisions of the Conveyancing Act, 1874, s. 35, which provides that a decree of division, whether pronounced by the Court or by arbiters, or an oversman, is equivalent to an unrecorded conveyance, and may be used as such for the completion of title.

5. As alternative to the action for division, a conclusion for sale may be added when the subjects are such that actual division is either impossible or would be attended with great loss. In such circumstances

<sup>1</sup> *Craig v. Fleming*, 1863, 1 M. 612.

<sup>2</sup> *Kennedy and Tullis v. Incorporation of Maltmen of Glasgow*, 1885, 12 R. 1026.

<sup>3</sup> Vol. III. p. 594.

<sup>4</sup> 7 Edw. VII. c. 51, s. 5.

<sup>5</sup> *Anderson v. Anderson*, 1857, 19 D 700; *M'Bride v. Paul*, 1862, 24 D. 546; *Brock v. Hamilton*, 1852, 19 D. 701. For forms see *Juridical Styles*, iii. 145-7; *Scots Style Book*, iii. 252; *Lewis, Sheriff Court Practice*, 7th ed., p. 465.

the summons concludes for judicial sale and division of the proceeds, and the remit will be to report as to division and the conditions of sale.<sup>1</sup> Even although the subjects are not physically incapable of division, yet if division would be injurious to the interests of the parties, by reducing the market value of their shares, they may insist for sale and division of the proceeds.<sup>2</sup> Power to the *pro indiviso* owners to bid at the sale may be reserved in the articles of roup.<sup>2</sup> It is usual to appoint the sale to proceed at the sight of the Clerk of Court upon articles of roup to be adjusted at his sight. In the articles of roup the proprietors should be taken bound to execute a disposition to the purchaser, which should be lodged in process. If any difficulty is likely to arise in getting the signatures of the proprietors, it is prudent to introduce into the summons a conclusion for adjudication of the subjects to the purchaser, decree in terms of which will give him a good title.<sup>3</sup> If a defender refuses to execute the disposition the Clerk of Court may be authorised to do so on his behalf.<sup>4</sup> The price realised, under deduction of the expenses of sale, is consigned in bank in name of the Clerk of Court and the sale reported. On the report being approved the pursuer is found entitled to his expenses and decree pronounced dividing the balance among the parties, authorising the bank to pay them the amounts decreed for, and ordaining the Clerk to deliver the disposition to the purchaser. The expense of preservation of the property may be allowed out of the consigned fund.<sup>5</sup>

#### SECTION 5.—ABSENT PERSONS.

6. The share of heritable estate belonging to an absent person may be sold under the conditions contained in the Presumption of Life Limitation (Scotland) Act, 1891.<sup>6</sup> If that Act is inapplicable, and it is desired to sell a property in which an absent person has a joint interest, a factor *loco absentis* may be appointed to him, and made the defender in any action of division and sale. The sale will have the effect of converting the succession from heritable to moveable.<sup>7</sup>

#### SECTION 6.—MOVEABLE PROPERTY.

7. Moveable property held *pro indiviso* may also be divided and sold at the instance of any of the *pro indiviso* proprietors.<sup>8</sup>

<sup>1</sup> For form of remit see *Morrison v. Kirk*, 1912 S.C. 44.

<sup>2</sup> *Thom v. Macbeth*, 1875, 3 R. 161.

<sup>3</sup> See *Campbell*, 1893, 1 S.L.T. 157.

<sup>4</sup> *Whyte v. Whyte* (O.H.), 1913, 2 S.L.T. 85.

<sup>5</sup> *Miller v. Crichton*, 1893, 1 S.L.T. 262.

<sup>6</sup> 54 & 55 Vict. c. 29, s. 4.

<sup>7</sup> *Macfarlane v. Greig*, 1895, 22 R. 405.

<sup>8</sup> *Stair*, i. 16, 4; *Ersk.* iii. 3, 56.

# DIVORCE.

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## SECTION 1.—INTRODUCTORY.

8. Divorce is the severance of the bond of marriage by the decree of a competent Court. There are in Scotland two grounds of divorce—namely, adultery and desertion. Upon proof that either the husband or the wife has committed one or other of these matrimonial offences, decree of divorce will be pronounced. An action of divorce is competent only in the Court of Session.

## SECTION 2.—JURISDICTION.

9. In order to give the Court jurisdiction to pronounce decree of divorce *a vinculo* it is necessary that the permanent domicile of the spouses should be within the territory. The domicile referred to is the domicile of the husband at the date of the action.<sup>1</sup> If the husband is permanently domiciled in Scotland it is immaterial that his motive in settling there was to obtain a divorce.<sup>2</sup> The *locus delicti* is also

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GENERAL AUTHORITIES.—Stair, i. 4, 7, 20; Bankt. i. 138 and 126 *seq.*; Ersk. i. 6, 43 *et seq.*; Bell's Prin., s. 1530 *et seq.*; Fraser on Husband and Wife, ii. 1128–76 and 1207–26; Walton on Husband and Wife, 2nd ed., 44 *et seq.*, 201 *et seq.*, 268 *et seq.*; Mackay, Manual, p. 475; Maclaren, Court of Session Practice, p. 719.

<sup>1</sup> *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *Manderson v. Sutherland*, 1899, 1 F. 621; *Hanna v. Hanna* (O.H.), 1895, 3 S.L.T. 163; *Pabst v. Pabst* (O.H.), 1898, 6 S.L.T. 117; *Wenyon v. Wenyon* (O.H.), 1900, 8 S.L.T. 323; *Main v. Main*, 1912, 1 S.L.T. 493.

<sup>2</sup> *Stavert v. Stavert*, 1882, 9 R. 519; *Carswell v. Carswell*, 1881, 8 R. 901; *Steel v. Steel*, 1888, 15 R. 896, at p. 904.



immaterial.<sup>1</sup> Where the husband being domiciled in Scotland commits adultery or deserts his wife, and thereafter acquires a foreign domicile, the wife is still entitled to her remedy in Scotland.<sup>2</sup> But the husband must have had a domicile in Scotland at the date of the adultery or the commencement of desertion.<sup>3</sup> The English Courts have assumed jurisdiction to grant divorce where the husband has obtained decree of nullity of marriage in the Courts of his domicile on grounds not recognised in English law.<sup>4</sup>

### SECTION 3.—TITLE TO SUE OR DEFEND.

**10.** The action cannot be raised except by the injured spouse, and it is thought cannot be continued by the heir or representative if the injured spouse die during its course.<sup>5</sup> But if the innocent spouse die after having obtained decree in the Outer House, his or her representatives having a patrimonial interest may be sisted and allowed to maintain the judgment.<sup>6</sup> The action may be defended by the children or next-of-kin of the defender,<sup>7</sup> or by the Lord Advocate.<sup>8</sup> Notwithstanding that it is said to have been the practice of the Commissary Court to allow any person having a patrimonial interest to defend, it is not clear that a creditor has a title to defend, at all events on the merits. A trustee in bankruptcy has been held entitled to pursue, on the ground of no jurisdiction but not on the merits, a reduction of a decree of divorce pronounced in absence against the bankrupt.<sup>9</sup> The action is incompetent at the instance of a lunatic,<sup>10</sup> but it may competently be brought against a lunatic on the ground of a matrimonial offence committed when sane.<sup>11</sup> The Court will appoint a *curator ad litem*. It has been held that a husband who had withdrawn his children from the jurisdiction contrary to an order of the Court was not barred thereby from suing for divorce.<sup>12</sup>

<sup>1</sup> *Warrender v. Warrender*, 1835, 2 S. & M'L. 154; *Carswell, Steel, Stavert, supra*; *Low v. Low*, 1891, 19 R. 115, per Lord Trayner.

<sup>2</sup> *Hume v. Hume*, 1862, 24 D. 1342; *Redding v. Redding*, 1888, 15 R. 1102; *Manderson v. Sutherland, supra*, per Lord Moncreiff at p. 629; *Stewart v. Stewart* (O.H.), 1905, 13 S.L.T. 668; *Mayberry v. Mayberry* (O.H.), 1908, 15 S.L.T. 1016; *Ramsay v. Ramsay*, 1925 S.C. 216; *Hannah v. Hannah* (O.H.), 1926 S.N. 74; *Lack v. Lack* (O.H.), 1926 S.N. 105; *Fraser, H. & W. ii.* 1212-89.

<sup>3</sup> *A. B. v. C. D.*, 1845, 7 D. 556; *Hanna v. Hanna, supra*.

<sup>4</sup> *Ogden v. Ogden*, [1908] P. 46, at pp. 82, 83; *Stathatos v. Stathatos*, [1913] P. 46; *De Montaigne v. De Montaigne*, [1913] P. 154.

<sup>5</sup> *Bell's Prin.*, s. 1534; *Fraser, H. & W. ii.* 1145; and see *Clement v. Sinclair*, 1762, Mor. 337; *Menzies v. Menzies*, 21st November 1835, F.C.; 14 S. 47; *Ritchie v. Ritchie*, 1874, 1 R. 826.

<sup>6</sup> *Ritchie, supra*.

<sup>7</sup> 24 & 25 Vict. c. 86, s. 10.

<sup>8</sup> *Ibid.*, s. 8.

<sup>9</sup> *Corbridge v. Somerville*, 1913 S.C. 858.

<sup>10</sup> *Thomson v. Thomson*, 1887, 14 R. 634.

<sup>11</sup> *Scott v. Scott*, 1908 S.C. 1124; *Rossie v. Rossie* (O.H.), 1899, 6 S.L.T. 357; cf. *Mordaunt v. Moncreiffe*, 1874, L.R. 2 Sc. App. 374.

<sup>12</sup> *Smeaton v. Smeaton* (O.H.), 1902, 10 S.L.T. 314.

## SECTION 4.—DIVORCE FOR ADULTERY.

SUBSECTION (1).—*History.*

11. Prior to the Reformation, divorce was granted only *a mensa et thoro*. Since 24th August 1560 divorce *a vinculo* has been granted in Scotland.<sup>1</sup> This change was not introduced by statute: it was a result of altered views of marriage: but it was confirmed and established by the Act 1573, c. 55, which introduced divorce for desertion.<sup>2</sup>

SUBSECTION (2).—*Defences.*

12. The following defences are recognised, namely: (1) denial of the fact of adultery. A wife may negative the charge by proving that she is *virgo intacta*.<sup>3</sup> (2) *Bona fides*. Fraser expresses the view that the *bona fide* belief that the intercourse alleged to be adulterous was lawful, as where, *e.g.*, a wife enters into a second marriage in the honest and reasonable belief that her first husband is dead, would be a good defence, and this has been held in one case.<sup>4</sup> But the *bona fides* must arise from an error as to fact and not as to law,<sup>5</sup> and it is thought that it would be no defence that the defender was in the mistaken belief that the former marriage had been legally dissolved by divorce. And the Court has refused to entertain this defence where the wife entered into an irregular connection.<sup>6</sup> (3) In the case of a wife, that she had not consented to the act of connection founded on. Thus, if a married woman were ravished<sup>7</sup> or had connection with a man in the belief that he was her husband,<sup>8</sup> or if she were insane at the time of the act,<sup>9</sup> she would not be guilty of adultery. But where she admits connection, the onus of establishing want of consent rests upon her.<sup>10</sup> (4) That the marriage sought to be dissolved was null *ab initio*.<sup>11</sup> (5) Long delay in raising the action where the adultery is known may infer acquiescence in or condonation of the injury.<sup>12</sup> But mere lapse of time since the date of the

<sup>1</sup> Fraser, H. & W. ii. 1139.

<sup>2</sup> See *Collins v. Collins*, 1884, 11 R. (H.L.) 19, per Lord Watson at p. 32; *cf.* argument in *Purves' Trs. v. Purves*, 1895, 22 R. 513.

<sup>3</sup> *Hunt v. Hunt*, 1856, 1 Deane 121; *Davidson v. Davidson*, 1860, 22 D. 749; *Johnston v. Johnston and Morgan*, reported on other points, 1903, 5 F. 659; *cf.* Fraser, Parent and Child, 3rd ed., p. 5.

<sup>4</sup> *Thomson v. Bullock*, 9th December 1836, F.C.; Fraser, H. & W. i. 138, and ii. 1143; but see Ersk. i. 6, 44; *Donald v. Donald*, 1863, 1 M. 741; *Hunter v. Hunter*, 1900, 2 F. 771, per Lord Pearson and Lord Justice-Clerk Macdonald.

<sup>5</sup> *Cf.* *Purves' Trs. v. Purves*, *supra*.

<sup>6</sup> *Donald*, *supra*.

<sup>7</sup> *Long v. Long*, 1890, 15 P.D. 218.

<sup>8</sup> Hume, i. 457; Fraser, H. & W. ii. 1142.

<sup>9</sup> *Long*, *supra*; *Mordaunt v. Moncreiffe*, 1874, L.R. 2 Sc. App. 374; but *cf.* *Yarrow v. Yarrow*, [1892] P. 92; *Hanbury v. Hanbury*, [1892] P. 222.

<sup>10</sup> *Stewart v. Stewart* (O.H.), 1914, 2 S.L.T. 310.

<sup>11</sup> *A. B. v. C. B.*, 1884, 11 R. 1060; 1885, 12 R. (H.L.) 36.

<sup>12</sup> Bell's Prin., s. 1531; *A. B. v. C. D.*, 1853, 15 D. 976; *Buchanan v. Downie*, 1837, 16 S. 82; *Duncan v. Maitland*, 9th March 1809, F.C.; *Holmes v. Holmes*, 1927 S.L.T. 20.

adultery is no bar if the adultery was unknown,<sup>1</sup> or if the pursuer, being absent from the country at the date of the adultery, raises action as soon as he returns.<sup>2</sup> (6) Collusion. (7) Condonation. (8) *Lenocinium* or connivance. Recrimination is not a good defence.<sup>3</sup>

SUBSECTION (3).—*Collusion*.

13. Collusion is a defence to an action of divorce, and also a ground for reduction of the decree.<sup>4</sup> It consists in any arrangement to permit a false case to be put forward, or to keep back a just defence, for the purpose of obtaining divorce.<sup>5</sup> It has been more than once remarked that English authorities on collusion are not a safe guide in Scotland, as the English law of divorce is purely statutory and differs in origin from the Scottish law. Lord Dunedin has expressed the opinion that in Scotland collusion will not be held to be established unless it be shewn that the oath of calumny<sup>6</sup> has been falsely sworn.<sup>7</sup> So it would not be collusion for one of the spouses to commit adultery in the hope that the other might bring a divorce, but with no agreement to that effect.<sup>8</sup> But it is collusion if one spouse arrange to commit adultery in order that the other may obtain divorce.<sup>9</sup> It is not collusion for a guilty spouse to give information to the other of the time and place of an offence already committed, or even, it has been said, for a pursuer to arrange that an action shall be undefended where there is no question that adultery has been committed,<sup>10</sup> *e.g.* for a husband who believes himself entitled to a divorce to promise his wife a provision on condition that she abstains from putting forward a false defence. But although the Court, if satisfied of the honesty of the parties, might take a lenient view of such an arrangement, it is humbly thought that it is *prima facie* very objectionable, and in direct conflict with the language of the oath of calumny. It is grave misconduct on the part of a law agent to assist the parties in concealing from the Court the true facts of the case.<sup>11</sup>

14. It is only in a very curious state of circumstances—such as a change of mind at the last moment before the trial—that this plea would be likely to be stated by the principal defender. But there can be no doubt of its competency.<sup>12</sup> It may also be taken by any subsidiary

<sup>1</sup> *Gatchell v. Gatchell* (O.H.), 1898, 6 S.L.T. 218; *Robertson v. Robertson* (O.H.), 1901, 9 S.L.T. 332.

<sup>2</sup> *Hellon v. Hellon*, 1873, 11 M. 290.

<sup>3</sup> *Lockhart v. Henderson*, 1799, Mor., voce “Adultery,” App. I., No. 1.

<sup>4</sup> *Graham v. Graham*, 1881, 9 R. 327; *Walker v. Walker*, 1911 S.C. 163.

<sup>5</sup> *Walker, supra*, per Lord Pres. Dunedin at p. 169.

<sup>6</sup> See para. 44, *infra*.

<sup>7</sup> *Fairgrieve v. Chalmers*, 1912 S.C. 745; see para. 44, *infra*.

<sup>8</sup> *Walker v. Walker, supra*.

<sup>9</sup> *Todd v. Todd*, 1866, L.R. 1 P. & D. 121; Fraser, H. & W. ii. 1194.

<sup>10</sup> *Ibid.*; see *Graham v. Graham, supra*, at p. 334, per Lord Young.

<sup>11</sup> See *S.S.C. Society v. Officer*, 1893, 20 R. 1106.

<sup>12</sup> See Lothian, Consistorial Law, p. 155; Mackay, Manual, p. 483; Maclaren, Court of Session Practice, p. 726.



defender, including a co-defender,<sup>1</sup> or by the Lord Advocate.<sup>2</sup> It was formerly said that it would be incompetent to state the plea after the oath of calumny had been administered,<sup>3</sup> but it is thought that this rule would not now obtain.<sup>4</sup> It is remarkable that there is no reported case in Scotland in which the plea of collusion has been sustained, and in only one or two cases has there been intervention by the Lord Advocate.<sup>5</sup>

15. A foreign divorce obtained by collusion will not be recognised. If it is shewn that the foreign Court was fraudulently misled by the parties into the belief that it had jurisdiction, a decree of divorce so obtained will not stand if it be afterwards challenged in the Court of the parties' true domicile.<sup>6</sup>

#### SUBSECTION (4).—*Condonation.*

##### (i) *In General.*

16. The pursuer will be barred from insisting in the action if he or she has condoned the adultery founded on. For "adultery does not annul the marriage, but is a just occasion on which the person injured may annul it and be free."<sup>7</sup> Condonation consists in the full forgiveness by the innocent spouse of the other's adultery. The best evidence of such full forgiveness is the fact that the injured spouse continued or resumed cohabitation at bed and board after being aware of the adultery.<sup>8</sup> Condonation may be inferred without proof of conjugal intercourse,<sup>9</sup> but it is not necessarily to be inferred from the husband taking the wife back into his household.<sup>9</sup> It has not been decided in Scotland by an Inner House judgment whether a merely verbal expression of forgiveness not followed by renewed cohabitation amounts to condonation. Fraser maintains that it does.<sup>10</sup> In *Ralston v. Ralston*<sup>11</sup> Lord Adam (Ordinary) held condonation established by letters expressing forgiveness, not followed by cohabitation. The Inner House reversed on another ground and the question was left open. In a later case Lord Stormonth Darling held that condonation by a husband could not be inferred from anything short of cohabitation.<sup>12</sup> Lord Fraser appears to be in error in thinking that his view has the support of Bankton or of

<sup>1</sup> *Fairgrieve v. Chalmers*, 1912 S.C. 745.

<sup>2</sup> 19 & 20 Vict. c. 96, s. 8.

<sup>3</sup> *Greenhill v. Ford*, 1822, 1 S. 296 (N.E. 275); affd. 1824, 2 Sh. App. 435.

<sup>4</sup> Fraser, H. & W. ii. 1194.

<sup>5</sup> See *Ralston v. Ralston*, 1881, 8 R. 371.

<sup>6</sup> *Shaw v. Gould*, 1868, L.R. 3 E. & I. App. 55, per Lord Westbury at p. 82; *Dolphin v. Robins*, 1859, 7 H.L.C. 390, per Lord Kingsdown at p. 422; *Harvey v. Farnie*, 1882, 8 App. Cas. 43; *Bonaparte v. Bonaparte*, [1892] P. 402.

<sup>7</sup> Stair, i. 4, 7.

<sup>8</sup> Bankt. i. 5, 129; Ersk. i. 6, 45; Fraser, H. & W. ii. 1126; *Collins v. Collins*, 1882, 10 R. 250; 1884, 11 R. (H.L.) 19.

<sup>9</sup> *Edgar v. Edgar*, 1902, 4 F. 632, per Lord President and Lord McLaren at p. 635.

<sup>10</sup> Fraser, H. & W. ii. 1176.

<sup>11</sup> 1881, 8 R. 371.

<sup>12</sup> *Hunt v. Hunt*, 1893 (O.H.), 31 S.L.R. 244; 1 S.L.T. 157.



the canonists whom he cites.<sup>1</sup> It is thought that the passages to which he refers are only directed towards shewing that it is not necessary to prove an express declaration of forgiveness provided that there has been *reconciliatio*.<sup>2</sup> In England the law is now settled that mere words are not sufficient. There must be "something which amounts to a reconciliation and to a reinstatement of the wife in the condition in which she was before she transgressed."<sup>3</sup> This does not necessarily imply sexual intercourse.<sup>3</sup> But it has been held in England that a husband who has sexual intercourse with his wife in full knowledge of her adultery is conclusively presumed to have condoned the offence,<sup>4</sup> and it is thought that this is also the law in Scotland.

17. A husband is not obnoxious to the plea if he merely had suspicions of his wife's conduct.<sup>5</sup> In order to support the plea it must be shewn that there was full knowledge of the offence.<sup>6</sup> Notwithstanding the opinion of Lord Fraser to the contrary,<sup>7</sup> it is thought that a husband will be held to have condoned his wife's misconduct by cohabitation with her when he is convinced of her guilt, even if he has not legal proof of it such as would be sufficient to enable him to get a divorce. He will certainly be held to have condoned the offence if his attitude of mind is one of determination to continue cohabitation whether his wife is guilty or innocent.<sup>8</sup> Where the husband continues to live under the same roof as the wife after he has discovered her infidelity, there is a presumption that he has condoned the offence. But this may be rebutted on proof that there was no reconciliation, and that they occupied separate rooms. The husband is not to be prejudiced because he did not turn his wife into the street at a moment's notice.<sup>9</sup>

18. Condonation cannot be conditional, as, *e.g.*, on future good behaviour. The acts condoned cannot afterwards be founded on as grounds of divorce.<sup>10</sup> But condonation will not be extended beyond the

<sup>1</sup> Bankt. i. 5, 129; Carpzovius, ii. 11, 197; Sanchez, x. 14, 1, and x. 5, 19.

<sup>2</sup> Voet, xxiv. 2, 5; *cf.* Freisen, *Geschichte des Canonischen Eherechts*, 2nd ed., Paderborn, 1893, pp. 836, 844 *et seq.*; *Crocker v. Crocker*, [1921] P. 25; *Bernstein v. Bernstein*, [1893] P. 292.

<sup>3</sup> *Keats v. Keats*, 1859, 1 Sw. & Tr. 334, per Lord Chelmsford at p. 339; *cf.* French Code Civil, s. 244.

<sup>4</sup> *Cramp v. Cramp and Freeman*, [1920] P. 158; *Turnbull v. Turnbull*, 1925, 41 T.L.R. 507; but see *Hare v. Hare*, 1920, 36 T.L.R. 331; *Roberts v. Roberts*, 1917, 117 L.T. 157; 33 T.L.R. 333.

<sup>5</sup> *Legrand v. Stewart*, 1782, 2 Pat. 596; *Wemyss v. Wemyss*, 1866, 4 M. 660; *Collins v. Collins*, 1882, 10 R. 250; 1884, 11 R. (H.L.) 19. <sup>6</sup> *A. v. B.*, 1870, 8 S.L.R. 258.

<sup>7</sup> Fraser, H. & W. ii. 1182; and see *Legrand v. Stewart*, *supra*; *Elwes v. Elwes*, 1796, 1 Hagg. Con. 292; *D'Aguilar v. D'Aguilar*, 1794, 1 Hagg. Ec. Supp. 775, per Lord Stowell.

<sup>8</sup> *Keats v. Keats*, *supra*; Fraser, H. & W. ii. 1181.

<sup>9</sup> *Stedman v. Stedman*, 1742, 6 Pat. App. Supp. 675; *Dance v. Dance*, 1799, 1 Hagg. Ec. 794 n.; *Westmeath v. Westmeath*, 1827, 2 Hagg. Ec. Supp. 110; *D'Aguilar v. D'Aguilar*, *supra*, at p. 781; *Snow v. Snow*, 1842, 2 N.C. Supp. i.; *Beeby v. Beeby*, 1799, 1 Hagg. Ec. 789; *Timmings v. Timmings*, 1792, 3 Hagg. Ec. 76, at p. 88.

<sup>10</sup> *Collins v. Collins*, 1884, 11 R. (H.L.) 19; *Wemyss v. Wemyss*, 1866, 4 M. 660. The law in England is different. It appears there to be settled that all condonation is conditional, and that the offence condoned may be revived on subsequent misconduct. *Collins*, *supra*, per Lord Blackburn at p. 29; *Cramp v. Cramp and Freeman*, [1920] P. 158, at p. 164, and cases there cited.

adultery which was known to the husband at the time of the reconciliation. For he might be willing to forgive a single act committed in circumstances of strong temptation, but not a course of profligacy.<sup>1</sup> So the fact of a husband having condoned his wife's adultery with A. will not bar him from raising a divorce on the ground of her adultery with B. prior to such condonation and unknown to the husband when he forgave her misconduct with A. As to A. the condonation remains effectual.<sup>2</sup> And the condonation of an act of adultery with A. will not bar the husband from founding on another act with A. subsequent to the condonation,<sup>3</sup> or from referring to the condoned adultery for the purpose of throwing light upon doubtful conduct with A. or with another subsequent to the condonation.<sup>4</sup> But a husband who discovers that his wife has been carrying on an adulterous intercourse for some time may condone her misconduct without precise knowledge of every act.<sup>5</sup>

19. Condonation does not bar the husband from raising an action of damages against the paramour.<sup>6</sup>

### (ii) *Condonation Implied from mora.*

20. Long delay in bringing the action after knowledge of the offender's guilt raises a presumption of acquiescence, and unless satisfactorily explained will be regarded as equivalent to condonation.<sup>7</sup> Much will depend on the conduct of the parties, and the action will not be barred unless in the circumstances the delay clearly leads to the inference that there was acquiescence in the injury. The delay may be explained by absence from the country, if the action be raised as soon as the pursuer returns,<sup>8</sup> by misapprehension as to the law,<sup>9</sup> by the honest desire to give the other spouse a chance of reforming,<sup>10</sup> or by some other good ground.<sup>11</sup>

### (iii) *Condonation by the Wife.*

21. A wife will not so readily be held to be barred by condonation. It may appear that she was deterred by fear from taking instant action.

<sup>1</sup> *D'Aguilar v. D'Aguilar*, 1794, 1 Hagg. Ec. Supp. 775; *Durant v. Durant*, 1825, 1 Hagg. Ec. 752, at p. 773; *Turton v. Turton*, 1830, 3 Hagg. Ec. 338, at p. 351; *Bramwell v. Bramwell*, 1831, 3 Hagg. Ec. 618, at p. 629; *Bernstein v. Bernstein*, [1893] P. 292.

<sup>2</sup> *Ralston v. Ralston*, 1881, 8 R. 371; *Bernstein*, *supra*.

<sup>3</sup> *Collins v. Collins*, 1884, 11 R. (H.L.) 19; *Ferrers v. Ferrers*, 1788, 1 Hagg. Con. 130; *Wilton v. Wilton*, 1859, 1 Sw. & Tr. 563; *Alexandre v. Alexandre*, 1870, L.R. 2 P. & D. 164; *Sanchez*, x. 5, 20.

<sup>4</sup> *Robertson v. Robertson*, 1888, 15 R. 1001; *Collins*, *supra*.

<sup>5</sup> *Steven v. Steven* (O.H.), 1919, 2 S.L.T. 239.

<sup>6</sup> *Macdonald v. Macdonald*, 1885, 12 R. 1327.

<sup>7</sup> *Duncan v. Maitland*, 9th March 1809, F.C.; *Anon.*, 1758, 5 Br. Supp. 863; *A. B. v. C. D.*, 1853, 15 D. 976; *Hellon v. Hellon*, 1873, 11 M. 290; *Holmes v. Holmes*, 1927, S.L.T. 20; *Bell's Prin.*, s. 1531; *Fraser, H. & W.* ii. 1199; and see para. 12, *supra*.

<sup>8</sup> *Hellon*, *supra*.

<sup>9</sup> *Tollemache v. Tollemache*, 1859, 1 Sw. & Tr. 557.

<sup>10</sup> *Green v. Green*, 1873, L.R. 3 P. & D. 121; *Mason v. Mason*, 1883, 8 P.D. 21.

<sup>11</sup> *Newman v. Newman*, 1870, L.R. 2 P. & D. 57; *Gatchell v. Gatchell* (O.H.), 1898, 6 S.L.T. 218; *Robertson v. Robertson* (O.H.), 1901, 9 S.L.T. 332.

And even where this is not the case her forbearance does not so strongly point to acquiescence in the wrong. It has been said: "It is a merit in her to be patient and to endeavour to reclaim;" nor is it her duty till compelled by the last necessity to have recourse to the legal remedy.<sup>1</sup> But the plea has been sustained against a wife.<sup>2</sup>

(iv) *Pleading.*

22. Condonation ought to be pleaded on the record, but if the facts proved at the trial establish condonation, it is *pars judicis* to refuse divorce.<sup>3</sup> It is not the duty of the Lord Advocate to insist in a plea of condonation which has been stated by the defender and subsequently withdrawn.<sup>4</sup> In special circumstances the plea of condonation might be treated as a preliminary plea,<sup>5</sup> but in modern practice the whole proof on adultery as well as on condonation is taken together. A plea of condonation subsequent to the date of the Lord Ordinary's interlocutor has been allowed to be added in the Inner House.<sup>6</sup>

SUBSECTION (5).—*Lenocinium or Connivance.*

23. The pursuer is barred from obtaining decree if it appears that he or she has been guilty of connivance at the adultery complained of. *Lenocinium* ought to be pleaded, but it is *pars judicis* to notice this defence even if not pleaded,<sup>7</sup> and the Court may direct the case to be laid before the Lord Advocate in order that he may determine whether he should appear and defend.<sup>8</sup>

24. *Lenocinium* in its primary sense means the making of gain by the prostitution of another. But it is not necessary that the element of pecuniary gain should be present.<sup>9</sup> The Court has repeatedly declined to define *lenocinium*, but various descriptions of it have been given. "When a husband is accessory to the crime of adultery by his wife, or is a participant in the crime, or is the direct occasion of her lapse from virtue."<sup>10</sup> "Did the husband by his own conduct cause or

<sup>1</sup> *Beeby v. Beeby*, 1799, 1 Hagg. Ec. 789, at p. 794; see *Greenhill v. Ford*, 1822, 1 S. 296; affd. 2 S. App. 435; *Durant v. Durant*, 1825, 1 Hagg. Ec. 752, at p. 768; *Angle v. Angle*, 1848, 12 Jur. 525; *Peacock v. Peacock*, 1858, 1 Sw. & Tr. 184; Fraser, H. & W. ii. 1178.

<sup>2</sup> *Crs. of Watson v. Cruikshank*, 1681, Mor. 330; *Anon.*, 1758, 5 Br. Supp. 863; see Lothian, Consistorial Law, p. 163; *Westmeath v. Westmeath*, 1827, 2 Hagg. Ec. Supp. 110. at p. 113; *Snow v. Snow*, 1842, 2 N.C. Supp. i.

<sup>3</sup> Fraser, H. & W. ii. 1183; *Curtis v. Curtis*, 1859, 4 Sw. & Tr. 234; *Moosbrugger v. Moosbrugger*, 1913, 109 L.T. 192; but see *Suggate v. Suggate*, 1859, 1 Sw. & Tr. 490.

<sup>4</sup> *Ralston v. Ralston*, 1881, 8 R. 371.

<sup>5</sup> *Greenhill v. Ford*, *supra*.

<sup>6</sup> *Robertson v. Robertson*, 1888, 15 R. 1001.

<sup>7</sup> *Munro v. Munro*, 1877, 4 R. 332; *Gallacher v. Gallacher*, 1927, S.N. 49; *M'Mahon v. M'Mahon* (O.H.), 1928, S.N. 37; Fraser, H. & W. ii. 1193.

<sup>8</sup> 24 & 25 Vict. c. 86, s. 8; see *Ralston v. Ralston*, *supra*; *Paul v. Paul*, 1896, 4 S.L.T. 124.

<sup>9</sup> *Mackenzie v. Mackenzie*, 1745, Mor. 333; *Wemyss v. Wemyss*, 1866, 4 M. 660.

<sup>10</sup> *Wemyss*, *supra*, per Lord Justice-Clerk Inglis at p. 662; *Munro*, *supra*, per Lord Ormisdale at p. 342.



conduce to his wife's guilt or did he connive at or consent thereto?"<sup>1</sup> "An attempt to corrupt his wife's chastity or a pandering to her guilt."<sup>2</sup> "Conduct on the part of the husband which makes him the pander to his own dishonour, the wilful tempter and inciter of his wife to the commission of adultery."<sup>3</sup> Passive acquiescence is not enough. "There must be something on the husband's part of an active character. *Co-operari et positive concurrere*, says Sanchez, and I think that is an accurate description. I cannot help thinking that the passive acquiescence of which Lord Fraser speaks<sup>4</sup> is not mere passive acquiescence, but acquiescence in such circumstances as to give it an active character. That there must be something done by the husband I cannot doubt."<sup>5</sup>

25. English authorities on connivance are to be applied with caution in Scotland.<sup>6</sup> For although, notwithstanding the opinion of Lord Justice-Clerk Inglis to the contrary in the case of *Wemyss*, it would seem that in the Canon Law as in the law of England the doctrine is founded on the maxim *volenti non fit injuria*, the development of the doctrine has differed in Scotland and in England.<sup>7</sup> The English doctrine appears to be wider at all events in its application. In both countries the essence of the doctrine is corrupt intention on the part of the husband.<sup>8</sup> But the English Courts infer that intention from inaction as well as from action on the husband's part.<sup>9</sup> Mere imprudence, however, is not enough if it does not appear that there was corrupt intention or that the husband's conduct was the direct occasion of the wife's adultery.<sup>10</sup>

26. Strong evidence is required to support the plea. In some of the cases where it has been sustained there has been a deliberate conspiracy to procure the adultery.<sup>11</sup> Taking a wife to a brothel has been held not to be *lenocinium* unless it is done to tempt her to commit adultery.<sup>12</sup> Where a husband, whose wife had been a prostitute, deserted her without supplying her with the means of support, and recommended her to return to her former life, the plea was sustained.<sup>13</sup> Such a recommenda-

<sup>1</sup> *Munro v. Munro*, 1877, 4 R. 332, per Lord Gifford at p. 344.

<sup>2</sup> *Donald v. Donald*, 1863, 1 M. 741, per Lord Ormisdale at p. 743.

<sup>3</sup> *Ibid.*, per Lord Ardmillan at p. 748.

<sup>4</sup> Fraser, H. & W. ii. 1186.

<sup>5</sup> *Thomson v. Thomson*, 1908 S.C. 179, per Lord Pres. Dunedin at p. 185.

<sup>6</sup> *Wemyss v. Wemyss*, 1866, 4 M. 660, per Lord Justice-Clerk Inglis at p. 661; *Thomson v. Thomson*, *supra*, per Lord Pres. Dunedin.

<sup>7</sup> Sanchez, *De Sancto Matrimonio*, x. 5, 4 and 5, and x. 12, 52; Freisen, *Geschichte des Canonischen Eherechts*, 836.

<sup>8</sup> Cf. *Phillips v. Phillips*, 1844, 1 Rob. E. 144; *Hoar v. Hoar*, 1801, 3 Hagg. Ec. 137; *Munro v. Munro*, *supra*, per Lord Pres. Inglis at p. 341.

<sup>9</sup> *Moorsom v. Moorsom*, 1793, 3 Hagg. Ec. 87, per Lord Stowell at p. 107; *Crewe v. Crewe*, 1800, 3 Hagg. Ec. 123, at p. 129; *Walker v. Walker*, 1796, 3 Hagg. Ec. 59; *Marris v. Marris*, 1862, 31 L.J. P. & M. 72; *Gipps v. Gipps*, 1863, 32 L.J. P. & M. 78; *Robinson v. Robinson*, [1903] P. 155; *Lankester v. Lankester and Cooper*, [1925] P. 114.

<sup>10</sup> *Glennie v. Glennie*, 1862, 32 L.J. P. & M. 17; *Phillips v. Phillips*, *supra*; *affd.* 1846, 4 N.C. 523; *Rix v. Rix*, 1777, 3 Hagg. Ec. 74; *Gilpin v. Gilpin*, 1804, 3 Hagg. Ec. 150; *Stone v. Stone*, 1844, 1 Rob. E. 99; *Gipps*, *supra*.

<sup>11</sup> *Allen v. Allen*, 1859, 30 L.J. P. & M. 2; *Picken v. Picken*, 1864, 34 L.J. P. & M. 22; *Gower v. Gower*, 1872, L.R. 2 P. & D. 428.

<sup>12</sup> *Donald v. Donald*, *supra*; *Wemyss v. Wemyss*, *supra*.

<sup>13</sup> *Marshall v. Marshall*, 1881, 8 R. 702.



tion is not *lenocinium* unless meant to be acted upon and so understood; <sup>1</sup> but if misconduct by a wife follows at a short period of time after a direct invitation by the husband to her to commit misconduct, the Court will assume that the invitation has been a contributory cause.<sup>2</sup> It is not *lenocinium* to watch a wife whose fidelity is suspected.<sup>3</sup> Desertion is not connivance,<sup>4</sup> nor is locking a wife repeatedly out of the house because she stayed out till after 10 p.m.<sup>5</sup> It has been said in England that a husband who has once connived at an act of adultery is barred from founding on a subsequent act either with the same or another paramour.<sup>6</sup> This, however, seems to be a matter of circumstances.<sup>7</sup>

27. Connivance may be pleaded against the wife, but will be even less readily sustained than against the husband.<sup>8</sup> It was sustained in the case of *Palmer* cited below, but the facts were very special.

#### SUBSECTION (6).—*Co-defender.*

28. The alleged paramour may be cited by the husband as a co-defender along with the wife.<sup>9</sup> He may be examined as a witness, but is not liable to be asked or bound to answer any question tending to shew that he has been guilty of adultery, unless he has given evidence in disproof of such adultery.<sup>10</sup> If adultery with him is proved, he may be found liable in the whole or part of the expenses of the action, taxed as between agent and client,<sup>9</sup> including sums advanced by the husband to the wife for her expenses.<sup>11</sup> The Court may dismiss him from the action on cause shewn "if in their opinion such a course is conducive to the justice of the case."<sup>12</sup> He will not be found liable in expenses if the woman was a prostitute,<sup>13</sup> or if he did not know and had no reason to suppose that she was a married woman.<sup>14</sup> If his conduct with the wife has been discreditable, he may be refused expenses, although adultery with her is not proved.<sup>15</sup> If the husband is shewn to have been grossly careless in exposing his wife to temptation, he may not be found entitled to all his expenses from the co-defender though adultery is proved.<sup>16</sup>

<sup>1</sup> *Hunter v. Hunter*, 1883, 11 R. 359.

<sup>2</sup> *Gallacher v. Gallacher*, 1927, S.L.T. 488, per Lord Fleming (Ordinary).

<sup>3</sup> *M'Intosh v. M'Intosh*, 1882, 20 S.L.R. 117.

<sup>4</sup> *Donald, supra.*

<sup>5</sup> *Fletcher v. Fletcher* (O.H.), 1902, 10 S.L.T. 296.

<sup>6</sup> *Lovering v. Lovering*, 1792, 3 Hagg. Ec. 85; *Gipps v. Gipps*, 1863, 32 L.J. P. & M. 72.

<sup>7</sup> See *Fraser, H. & W. ii.* 1191; *Hodges v. Hodges*, 1795, 3 Hagg. Ec. 118; *Rogers v. Rogers*, 1830, 3 Hagg. Ec. 61, at p. 72; *Stone v. Stone*, 1844, 3 N.C. 278.

<sup>8</sup> *Turton v. Turton*, 1830, 3 Hagg. Ec. 338; *Angle v. Angle*, 1848, 12 Jur. 525; *Dance v. Dance*, in note to *Beeby v. Beeby*, 1799, 1 Hagg. Ec. 794; *Palmer v. Palmer*, 1859, 29 L.J. P. & M. 26.

<sup>9</sup> 24 & 25 Vict. c. 86, s. 7.

<sup>10</sup> 37 & 38 Vict. c. 64, s. 2.

<sup>11</sup> *Munro v. Munro*, 1877, 4 R. 332.

<sup>12</sup> 24 & 25 Vict. c. 86, s. 7; *Miller v. Simpson*, 1863, 2 M. 225.

<sup>13</sup> *Miller, supra*; *Nelson v. Nelson*, 1868, L.R. 1 P. & D. 510.

<sup>14</sup> *Kydd v. Kydd*, 1864, 2 M. 1074.

<sup>15</sup> *Collins v. Collins*, 1882, 10 R. 250; 1884, 11 R. (H.L.) 19; *Edward v. Edward*, 1879, 6 R. 1255; *Laidlaw v. Laidlaw*, 1894, 2 S.L.T. 168.

<sup>16</sup> *Codrington v. Codrington*, 1865, 34 L.J. P. & M. 60; *Badcock v. Badcock*, 1858, 1 Sw. & Tr. 189.

29. Any ground of jurisdiction will be sustained against a co-defender which would make him liable to be sued in Scotland for a personal debt.<sup>1</sup> Damages may be asked against a co-defender in the summons of divorce or in a separate action: and it is no defence that the pursuer has condoned the wife's guilt and taken her back.<sup>2</sup> The husband is entitled to reparation not only for the loss of his wife's society but for the injury to his feelings.<sup>3</sup> But a co-defender will not be found liable in damages unless he knew or ought to have known that the defender was a married woman.<sup>4</sup> In mitigation of damages it is relevant to prove that the marriage was unhappy,<sup>5</sup> or that the spouses were living apart,<sup>6</sup> or that the husband had also been guilty of adultery,<sup>7</sup> or that he was careless of his wife's conduct or reputation.<sup>8</sup> Damages are not to be measured by the means of the co-defender,<sup>9</sup> but the position in life of the parties may be considered.<sup>10</sup>

30. Where there are admissions by the defender these may not be evidence against the co-defender, and accordingly the Court may find that the defender has been guilty of adultery and may assoilzie the co-defender. In such a case the finding against the defender will be one of adultery in general terms.<sup>11</sup>

#### SUBSECTION (7).—*Averments of Adultery.*

31. It has been said that the same specification of time and place should be given as in a criminal libel.<sup>12</sup> But this rule is subject to considerable exception depending upon the circumstances and the reasons which may make such precision impossible.<sup>13</sup> Thus an averment that adultery was committed over a period of three months has been held relevant.<sup>14</sup> On the other hand, periods of one to three years have been held too indefinite,<sup>15</sup> and an averment of adultery "in hotels and public-houses in Glasgow, the particular places being unknown to the pursuer," has been held irrelevant.<sup>16</sup> Adultery may be relevantly alleged with a person or persons unknown to the pursuer.<sup>17</sup> Where the ground

<sup>1</sup> *Fraser v. Fraser and Hibbert*, 1870, 8 M. 400.

<sup>2</sup> *Macdonald v. Macdonald*, 1885, 12 R. 1327.

<sup>3</sup> *Glover v. Samson*, 1856, 18 D. 609; *Baillie v. Bryson*, 1818, 1 Mur. 317.

<sup>4</sup> *Langrick v. Langrick*, [1920] P. 90; *Taylor v. Taylor*, 1920, 123 L.T. 112; *Smith v. Smith*, [1922] P. 1; see *Kydd v. Kydd*, 1864, 2 M. 1074.

<sup>5</sup> *A. v. B. and C. (O.H.)*, 1922, S.L.T. 392.

<sup>6</sup> *Keyse v. Keyse*, 1886, 11 P.D. 100; *Butterworth v. Butterworth*, [1920] P. 126.

<sup>7</sup> *Baillie v. Bryson*, *supra*; *Bromley v. Wallace*, 1802, 4 Esp. 237.

<sup>8</sup> *Calcraft v. Harborough*, 1831, 4 C. & P. 499; *Manton v. Manton*, 1865, 4 Sw. & Tr. 159.

<sup>9</sup> *Keyse v. Keyse*, *supra*.

<sup>10</sup> *Burne v. Burne*, [1920] P. 17; *Butterworth*, *supra*.

<sup>11</sup> *Leitch v. Leitch*, 1906, 14 S.L.T. 396.

<sup>12</sup> *Tulloch v. Tulloch*, 1861, 23 D. 639, per Lord Justice-Clerk Inglis at p. 644; *Soeder v. Soeder*, 1897, 24 R. 278, per Lord McLaren.

<sup>13</sup> *Bennet-Clark v. Bennet-Clark*, 1909 S.C. 591.

<sup>14</sup> *Tulloch*, *supra*; *Walker v. Walker*, 1871, 9 M. 1091.

<sup>15</sup> *Soeder*, *supra*; *Steel v. Steel*, 1835, 13 S. 1096.

<sup>16</sup> *Walker v. Walker*, *supra*.

<sup>17</sup> *Smith v. Smith*, 1838, 16 S. 499; *Gray v. Gray*, 1865, 37 Sc. Jur. 566.

of action is the birth of an illegitimate child to the defender, specification of the time and place of adultery or of the paramour is not required; but the pursuer must in such a case aver facts and circumstances which exclude the possibility of access at the date of conception.<sup>1</sup> A pursuer who has obtained decree of judicial separation on the ground of adultery may found upon the same acts for the purpose of divorce.<sup>2</sup>

SUBSECTION (8).—*Evidence of Adultery.*

**32.** There must be “enough to lead the guarded discretion of a reasonable and just man to the conclusion that adultery has been committed.”<sup>3</sup> Adultery may be inferred from facts and circumstances without direct proof of any specific act of adultery.<sup>4</sup> Indeed, direct evidence that the parties were seen in the act of adultery will be received with caution.<sup>5</sup> The uncorroborated evidence of one witness is not sufficient,<sup>6</sup> and the testimony of a boy of six in corroboration was rejected.<sup>7</sup> But a witness to one act may be corroborated by a witness to another act.<sup>8</sup> The evidence of prostitutes that the defender committed adultery with them may be sufficient, though it will be received with caution.<sup>9</sup>

**33.** Antenuptial incontinence by the defender may be proved if with the person with whom the adultery is alleged:<sup>10</sup> and evidence of indecent conduct with the alleged paramour either before or after the adultery founded on will be allowed.<sup>11</sup> Evidence of indecent conduct by a man towards a servant in his house was in one case admitted as corroborative of the evidence of another servant that he had committed adultery with her;<sup>12</sup> but in a later case an averment that a former unmarried servant in the co-defender’s employment had given birth to a child of which he was the father was held to be irrelevant.<sup>5</sup> The fact that the defender went to a brothel founds a strong presumption presumptive of adultery, but it may be rebutted.<sup>13</sup> Proof that the defender infected the pursuer with venereal disease is *prima facie* evidence of adultery.<sup>14</sup> An extract conviction for rape is competent evidence of

<sup>1</sup> *Tulloh v. Tulloh*, 1861, 23 D. 639; *Pegg v. Pegg*, 1859, 21 D. 820.

<sup>2</sup> *Macpherson v. Macpherson* (O.H.) 1911, 2 S.L.T. 99.

<sup>3</sup> *Loveden v. Loveden*, 1810, 2 Hagg. C.R. 2; cf. *Cadogan v. Cadogan*, 1796, 2 Hagg. C.R. 4; *Allen v. Allen*, [1894] P. at p. 251; *Walker v. Walker*, 1871, 9 M. 1091.

<sup>4</sup> *Walker*, *supra*.

<sup>5</sup> *Johnston v. Johnston and Morgan*, 1903, 5 F. 659.

<sup>6</sup> *Wilson v. Wilson*, 1898, 25 R. 788.

<sup>7</sup> *Robertson v. Robertson*, 1888, 15 R. 1001.

<sup>8</sup> *Whyte v. Whyte*, 1884, 11 R. 710; *Dombrowitzki v. Dombrowitzki*, 1895, 22 R. 906; *Wilson v. Wilson*, *supra*.

<sup>9</sup> *Tennant v. Tennant*, 1883, 10 R. 1187.

<sup>10</sup> *Fraser, H. & W. ii.* 1164; *Perrin v. Perrin*, 1822, 1 Add. 1; *Reeves v. Reeves*, 1813, 2 Phill. 127.

<sup>11</sup> *Burgess v. Burgess*, 1817, 2 Hagg. C.R. 223, at p. 229.

<sup>12</sup> *Whyte v. Whyte*, *supra*.

<sup>13</sup> *Marshall v. Marshall*, 1881, 8 R. 702; *Ciocci v. Ciocci*, 1853, 1 Spinks 121; *Edward v. Edward*, 1879, 6 R. 1255.

<sup>14</sup> *Fraser, H. & W. ii.* 1159; *Popkin v. Popkin*, 1794, 1 Hagg. E.R. 767; *Collett v. Collett*, 1838, 1 Curt. E.R. 678, at p. 688; *King v. King*, 1847, 5 N.C. 252; see *Morphett v. Morphett*, 1869, L.R. 1 P. & D. 702.



adultery,<sup>1</sup> and so also is an extract decree of affiliation and aliment obtained against the defender by the paramour, at least if supported by an extract certificate of the child's birth docquetted with the import of the decree.<sup>2</sup>

**34.** If adultery is sought to be inferred from the fact of the wife's pregnancy, the husband must prove the impossibility of access.<sup>3</sup> The inference of adultery has been drawn from the birth of a child 348 days after the last opportunity of access;<sup>4</sup> and where 331 days had elapsed since the last act of intercourse between the spouses, the *onus* was held to be upon the defender to shew that the pursuer was the father of the child.<sup>5</sup> Adultery was held proved where the alleged paramour had obtained decree of filiation against the defender, and he had failed to appear after personal service;<sup>6</sup> and also where the fact of adultery had been held proved in another action to which the defender was a party.<sup>7</sup>

**35.** A confession of guilt made by the defender *ante litem motam* is entitled to great weight if there is nothing to lead the Court to suspect collusion.<sup>8</sup> Such a confession is not evidence against the co-defender unless it has been communicated to him and not denied.<sup>9</sup> A conviction of rape, with letters from a husband in which he referred to his imprisonment without denying his guilt, was held sufficient.<sup>10</sup> So also was the fact that the defender had registered a child as illegitimate, and stated to the registrar that she had not lived with her husband for two years.<sup>11</sup> Judicial admissions by the defender though received with caution may go far to establish the charge; but they must be corroborated.<sup>12</sup> Confessions made by the *particeps criminis* outwith the presence of the defender are not admissible unless they have been communicated and not denied.<sup>13</sup>

<sup>1</sup> *Galbraith v. Galbraith*, 1902 (O.H.), 9 S.L.T. 346.

<sup>2</sup> *Mathieson v. Mathieson* (O.H.), 1919, 1 S.L.T. 511; *M'Dougall v. M'Dougall*, 1927, S.L.T. 481.

<sup>3</sup> *Tulloch v. Tulloch*, 1861, 23 D. 639; *Brierly v. Brierly*, [1918] P. 257.

<sup>4</sup> *Doherty v. Doherty* (O.H.), 1922, S.L.T. 245.

<sup>5</sup> *Gray v. Gray* (O.H.), 1919, 1 S.L.T. 163; but see *contra Gaskill v. Gaskill*, [1921] P. 425, per Lord Birkenhead, L.C.

<sup>6</sup> *Mathieson v. Mathieson*, *supra*; cf. *M'Dougall v. M'Dougall*, *supra*.

<sup>7</sup> *Ruck v. Ruck*, [1896] P. 152; *Eskell v. Eskell*, 1919, 88 L.J. P. 128; *Partington v. Partington and Atkinson*, [1925] P. 34; *O'Toole v. O'Toole*, 1926, 42 T.L.R. 245; *Little v. Little*, [1927] P. 224.

<sup>8</sup> *Robinson v. Robinson*, 1859, 1 Sw. & Tr. 362; *Williams v. Williams*, 1865, L.R. 1 P. & D. 29; *Fullerton v. Fullerton*, 1873, 11 M. 720; *Le Marchant v. Le Marchant*, 1876, 45 L.J. P. & M. 43; *Duncan v. Duncan*, 1893, 30 S.L.R. 435; *Leitch v. Leitch*, 1906, 14 S.L.T. 396; *Getty v. Getty*, [1907] P. 334; *Collins v. Collins*, 1917, 115 L.T. 936; *Smith v. Smith*, 1866, 2 S.L.R. 243; *Hartley v. Hartley*, 1919, 35 T.L.R. 298.

<sup>9</sup> *Crawford v. Crawford*, 1886, 11 P.D. 150; *Laidlaw v. Laidlaw*, 1894, 2 S.L.T. 168; *Leitch v. Leitch*, 1906, 14 S.L.T. 396.

<sup>10</sup> *Coffey v. Coffey*, [1898] P. 169; *Galbraith v. Galbraith*, 1902 (O.H.), 9 S.L.T. 346.

<sup>11</sup> *Duncan v. Duncan* (O.H.), 1893, 30 S.L.R. 435.

<sup>12</sup> 11 Geo. IV. and 1 Will. IV. c. 69, s. 36; *Muirhead v. Muirhead*, 1846, 8 D. 786; *Macfarlane v. Macfarlane*, 1847, 9 D. 500; *Dickson on Evidence*, s. 284.

<sup>13</sup> *A. v. B.*, 1858, 20 D. 407; but see *contra Reid v. Reid* (O.H.), 1925, S.N. 147, per Lord Constable (Ordinary).



SECTION 5.—DIVORCE FOR DESERTION.

SUBSECTION (1).—*Definition and History.*

**36.** Divorce for desertion was introduced by the Act 1573, c. 55. The term is used to denote “the malicious and obstinat defectioun” of one spouse who “divertis fra utheris companie without ane ressonabile caus . . . and remains in their malicious obstinacie be the space of four yeiris and in the meane time refusis all previe admonitiouns.” It is necessary to prove that there has been wilful and obstinate non-adherence persisted in for four years without reasonable cause.<sup>1</sup> Prior to 1861 an action of adherence was a necessary preliminary to an action of divorce for desertion.<sup>2</sup> But this is no longer the case.<sup>3</sup> It must appear that the pursuer did not acquiesce in the separation but was desirous to resume cohabitation. In the general case it must be shewn that the pursuer requested the defender to adhere.<sup>4</sup> But such privy admonition or remonstrance is not a solemnity, although where communication is possible and is not made, the Court will not readily infer the pursuer’s desire for reunion.<sup>5</sup> Where, however, from ignorance of the deserter’s address such communication cannot be made, or where it is shewn that it would have been fruitless if made, it may be dispensed with.<sup>6</sup> Repeated remonstrance is not necessary if it has been once sincerely made.<sup>7</sup> Where the defender has offered to adhere, the Court will scrutinise the circumstances and the manner in which the offer was made, in order to judge of its *bona fides*, and will disregard it if it appears to have been insincere, and made merely in order to prevent the success of the action.<sup>8</sup> It would seem that an offer to adhere comes too late if made after the action is raised,<sup>9</sup> and the opinion has been expressed that it is incompetent to question the pursuer as to willingness as at the date of the action to resume cohabitation.<sup>10</sup>

**37.** It is not desertion if the one spouse is compelled to leave the

<sup>1</sup> See *A. v. B.*, 1896, 23 R. 588.

<sup>2</sup> See ADHERENCE, Vol. I. p. 113, *ante*.

<sup>3</sup> Conjugal Rights Amendment Act, 1861 (24 & 25 Vict. c. 86), s. 11.

<sup>4</sup> *Watson v. Watson*, 1890, 17 R. 736; *Gibson v. Gibson*, 1894, 21 R. 470; *O’Hara v. O’Hara*, 1894 (O.H.), 1 S.L.T. 532; *Mackenzie v. Mackenzie*, 1895, 22 R. (H.L.) 32, per Herschell, L.C., at p. 34; *Taylor v. Taylor* (O.H.), 1896, 4 S.L.T. 159; *Horsley v. Horsley* (O.H.), 1914, 1 S.L.T. 92; *Farrow v. Farrow*, 1920 S.C. 707.

<sup>5</sup> *Barrie v. Barrie*, 1882, 10 R. 208; *Ross v. Ross*, 1899, 1 F. 963; *Robertson v. Robertson* (O.H.), 1908, 16 S.L.T. 641; *Shaw v. Shaw* (O.H.), 1908, 16 S.L.T. 371; *Willey v. Willey*, 1884, 11 R. 815.

<sup>6</sup> *Watson*, *supra*; *Murray v. Murray*, 1894, 21 R. 723; *Whalley v. Whalley* (O.H.), 1921, 2 S.L.T. 135; *Mulherron v. Mulherron*, 1923 S.C. 461.

<sup>7</sup> *M’Ewan v. M’Ewan*, 1908 S.C. 1263; *Hutchison v. Hutchison*, 1909 S.C. 148; *Inglis v. Inglis* (O.H.), 1919, 1 S.L.T. 184; *Pirie v. Pirie* (O.H.), 1927, S.N. 124.

<sup>8</sup> *Muir v. Muir*, 1879, 6 R. 1353; *Mackenzie v. Mackenzie*, 1893, 20 R. 636; 1895, 22 R. (H.L.) 32; *Lilley v. Lilley*, 1884, 12 R. 145; *Farrow v. Farrow*, 1920 S.C. 707; *Anderson v. Anderson*, 1928, S.L.T. 199.

<sup>9</sup> *Murray v. M’Lauchlan*, 1838, 1 D. 294; *Muir*, *supra*, per Lord Justice-Clerk Moncreiff; *Scott v. Scott*, 1908 S.C. 1124; *Pirie v. Pirie*, *supra*; but see *Auld v. Auld*, 1884, 12 R. 36.

<sup>10</sup> *Mulherron v. Mulherron*, 1923 S.C. 461, per Lord Ormidale and Lord Anderson.

home in order to prosecute his or her business, or if the absence is caused by imprisonment.<sup>1</sup> But where the intention to desert is manifest, it may be held to have continued during imprisonment.<sup>2</sup> It is not a bar to the action that the pursuer was the first to leave the common house, as, *e.g.*, where the wife is compelled to leave on account of the husband's violence and drunkenness. Such cases turn on their particular circumstances; and where the husband conceals his address or disregards an offer by the wife to resume cohabitation, the fact that the wife was the first to leave the house will not prevent her obtaining decree.<sup>3</sup> A separation which is not at first desertion may become so by a change of *animus*, *e.g.* a wife who has been living apart voluntarily may desire to return and intimate her willingness to do so; if the husband then refuse to take her back, having no valid reason for non-adherence, he will be in desertion; or a husband who has left his wife to seek employment, at first intending to come back, may change his mind and shew a clear intention to break off all communication with his wife. In such cases desertion will date not from the separation but from the time at which the defender's intention to refuse adherence first became manifest.<sup>4</sup> Where the pursuer had left her husband and obtained a decree of separation and aliment against him on the ground of his cruelty, she was held not entitled to decree on the ground of desertion.<sup>5</sup> But where it was proved that a wife had obtained such a decree in absence in order to enforce her husband's obligation to maintain his children, and he had subsequently disappeared for seven years, decree of divorce on the ground of desertion was granted.<sup>6</sup>

**38.** Refusal of marital intercourse may amount to desertion, although the parties are living in the same house.<sup>7</sup> But where parties are occupying the same bed, averments of refusal of intercourse will not ground an action.<sup>8</sup> In such a case marital intercourse will be inferred.<sup>9</sup>

#### SUBSECTION (2).—Defences.

**39.** As in the case of adultery, it is a good defence that there was collusion or that the marriage was null *ab initio*.<sup>10</sup> Long delay may be

<sup>1</sup> *Williams v. Williams*, 1864, 3 Sw. & Tr. 547; *Young v. Young*, 1882, 10 R. 184; Fraser, H. & W. ii. 1213.

<sup>2</sup> *Parker v. Parker*, 1926 S.C. 574.

<sup>3</sup> *Gow v. Gow*, 14 R. 443; *Murray v. Murray*, 1894, 21 R. 723; *Munro v. Munro* (O.H.), 1895, 2 S.L.T. 598.

<sup>4</sup> *Gow, supra*; *Munro, supra*; *Gibson v. Gibson*, 1894, 21 R. 470, per Lord Rutherford Clark at p. 479; Fraser, H. & W. ii. 1210.

<sup>5</sup> *Smellie v. Smellie* (O.H.), 1914, 2 S.L.T. 240.

<sup>6</sup> *Horsley v. Horsley* (O.H.), 1914, 1 S.L.T. 92.

<sup>7</sup> *Goold v. Goold*, 1927 S.C. 177; *Stair v. Stair* (O.H.), 1905, 12 S.L.T. 788; *A. v. B.* (O.H.), 1905, 13 S.L.T. 532; the law in England is different, see *Powell v. Powell*, [1922] P. 278; *Jackson v. Jackson*, [1924] P. 19.

<sup>8</sup> *X. v. Y.* (O.H.), 1914, 1 S.L.T. 366; *C. v. D.* (O.H.), 1921, 2 S.L.T. 82; *G. v. G.*, 1923 S.C. 175; *Goold, supra*.

<sup>9</sup> *Ibid.*; see also *Crs. of Watson v. Cruikshank*, 1681, Mor. 330.

<sup>10</sup> *Ricketts v. Ricketts*, 1866, 35 L.J. M.C. 92.

construed as importing acquiescence and so barring the action.<sup>1</sup> It is a good defence that the parties are living apart by mutual agreement, or that the wife has obtained under the Conjugal Rights Act <sup>2</sup> a protection order which is still unrecalled, or that the pursuer has been guilty of misconduct which would entitle the defender to a decree of judicial separation. Thus adultery of the pursuer, whether during the four years or afterwards, is a bar to the action.<sup>3</sup> And it would seem that even where a wife had entered into a second marriage in the *bona fide* belief that her first husband was dead, she would thereby be barred from afterwards obtaining decree of divorce against him for desertion.<sup>4</sup> It is still an open question whether any defence founded on the conduct of the pursuer is good which would not be a ground of judicial separation.<sup>5</sup>

SECTION 6.—PROCEDURE IN ACTIONS OF DIVORCE.

SUBSECTION (1).—*Procedure prior to Proof.*

40. The summons in an action of divorce may be signed either by a Clerk of Session or by a Writer to the Signet.<sup>6</sup> In actions upon the ground of adultery the name of the paramour must be stated if known.<sup>7</sup> If the alleged paramour is not called as a co-defender, intimation of the action must, unless cause is shewn to the contrary,<sup>8</sup> be made before a diet of proof is fixed, and the party to whom such intimation is made may appear and defend, subject to the same rights and liabilities as to expenses as a co-defender.<sup>9</sup> The intimation may be ordered at any stage of the cause, and whether the action is defended or not.<sup>10</sup> A person who so appears is entitled to a judgment on his or her guilt or innocence.<sup>8</sup>

41. Where the action is defended, the procedure as to making up a record is the same as in an ordinary action, and after the record is closed the pursuer moves to have the libel held relevant and for a diet of proof. If the action is undefended the pursuer may, on the expiry of the days for entering appearance, make a similar motion. But a diet will not be fixed for a date earlier than ten days from the date of calling the summons.<sup>11</sup> Where the pursuer or the defender is absent from the jurisdiction he or she may be required to sist a mandatory. But this is now unusual,<sup>12</sup> and it will not be required of a defender who is resident in the United Kingdom unless other special cause be shewn.<sup>13</sup> Where the husband is pursuer and is abroad, the usual course is to make

<sup>1</sup> *Goold v. Goold*, 1927 S.C. 177; but see *Mackenzie v. Mackenzie*, 1883, 11 R. 105.

<sup>2</sup> 24 & 25 Vict. c. 86, s. 1.

<sup>3</sup> *Auld v. Auld*, 1884, 12 R. 36.

<sup>4</sup> *Hunter v. Hunter*, 1900, 2 F. 771.

<sup>5</sup> See ADHERENCE, Vol. I. p. 113. See also *Anderson v. Anderson*, 1927 S.N. 161.

<sup>6</sup> See 13 & 14 Vict. c. 36, s. 15; 31 & 32 Vict. c. 100, s. 13; *Craig v. Craig*, 1851, 14 D. 261.

<sup>7</sup> But see para. 31, *supra*.

<sup>8</sup> See *Raeside v. Raeside*, 1913 S.C. 60.

<sup>9</sup> A.S., 17th July 1908; C.A.S., C, iv. 2.

<sup>10</sup> C.A.S., C, iv. 3.

<sup>11</sup> *Ramsay v. Ramsay* (O.H.), 1909, 1 S.L.T. 288.

<sup>12</sup> *Campbell v. Campbell*, 1854, 17 D. 514; *D'Ernesti v. D'Ernesti*, 1882, 9 R. 655.

<sup>13</sup> *Lawson's Trs. v. British Linen Co.*, 1874, 1 R. 1065; *North British Rly. Co. v. White*, 1881, 9 R. 97.



an interim award of expenses to the defending wife.<sup>1</sup> If this is not obeyed, the action will not be allowed to proceed without the sisting of a mandatory.<sup>2</sup> Where no defences have been lodged, a defender has nevertheless been allowed to appear at the proof;<sup>3</sup> and a special defence has been allowed to be lodged even after the proof, but before decree.<sup>4</sup> A defender may reclaim although he has not appeared in the Outer House at all, and he may be allowed then to lodge defences to such extent as the Court may determine.<sup>5</sup>

42. Where each spouse alleges adultery against the other counter-actions must be brought.<sup>6</sup> A counter-action may be raised at any time before final decree in the first action.<sup>7</sup> The Court will take the appropriate steps to ensure that the actions shall proceed together before the same judge,<sup>8</sup> and if necessary will sist the one until the other is ripe for judgment.<sup>9</sup> If decree of divorce in the one action is allowed to become final, it is incompetent to proceed with the other, as the marriage has been dissolved.<sup>10</sup>

43. The summons must be served on the defender personally by delivery of a copy to him if not within Scotland.<sup>11</sup> Service may be made by any person authorised by the pursuer.<sup>12</sup> A messenger-at-arms or other officer is not necessary. A certificate of execution of service must be returned to process. If the defender cannot be found edictal service is sufficient,<sup>13</sup> but in such case service must be made upon the children of the marriage, and also upon one or more of the next-of-kin if known and resident within Scotland, and the children and next-of-kin, whether cited or resident in Scotland or not, may appear and defend. Evidence should be led that the defender could not be found.<sup>14</sup>

#### SUBSECTION (2).—*The Oath of Calumny.*

44. The oath *de calumnia* in which the pursuer swears that the action is prosecuted without consent or collusion with the defender must be administered in all actions of divorce.<sup>15</sup> It may, even before the summons is called,<sup>16</sup> be taken to lie *in retentis* if the pursuer is going abroad.<sup>17</sup> When the pursuer is abroad or is unable to attend, the oath may be taken on commission.<sup>18</sup> The oath does not prevent reduction

<sup>1</sup> *Low v. Low* (O.H.), 1905, 12 S.L.T. 817.

<sup>2</sup> *Taylor v. Taylor* (O.H.), 1919, 1 S.L.T. 169.

<sup>3</sup> *Paterson v. Paterson*, 1848, 20 Sc. Jur. 459; *Watts v. Watts*, 1885, 12 R. 894.

<sup>4</sup> *Paul v. Paul*, 1896, 4 S.L.T. 124.

<sup>5</sup> *Cathcart v. Cathcart*, 1899, 1 F. 781; *Whyte v. Whyte*, 1891, 18 R. 469.

<sup>6</sup> *Lockhart v. Henderson*, 1799, Mor., voce "Adultery," App. I., No. 1.

<sup>7</sup> *Walker v. Walker*, 1871, 9 M. 460.

<sup>8</sup> *Powrie v. Powrie*, 1868, 6 M. 1111.

<sup>9</sup> *Brodie v. Brodie*, 1870, 8 M. 854.

<sup>10</sup> *Bridges v. Bridges*, 1911 S.C. 250.

<sup>11</sup> 24 & 25 Vict. c. 86, s. 10.

<sup>12</sup> 31 & 32 Vict. c. 100, s. 100.

<sup>13</sup> 24 & 25 Vict. c. 86, s. 10; see *Laughland v. Laughland* (O.H.), 1882, 19 S.L.R. 645.

<sup>14</sup> *Clark Kennedy v. Clark Kennedy* (O.H.), 1908, 15 S.L.T. 844.

<sup>15</sup> 11 Geo. IV. and 1 Will. IV. c. 69, s. 36.

<sup>16</sup> *Scott*, 1866, 4 M. 1103.

<sup>17</sup> *Potts*, 1839, 2 D. 248; cf. *Hook v. Hook*, 1862, 24 D. 488.

<sup>18</sup> *Orde v. Murray*, 1846, 8 D. 535; *A. B. v. C. D.*, 1838, 16 S. 1143; *M'Laren v. M'Laren*, 1849, 22 Sc. Jur. 46.



of a decree of divorce which has been obtained by collusion.<sup>1</sup> The form of oath is as follows :—

At Edinburgh, the \_\_\_\_\_ day of \_\_\_\_\_, in presence of the Hon. Lord \_\_\_\_\_, compeared the pursuer \_\_\_\_\_, who being solemnly sworn and examined *de calumnia*, depones that he [or she] has just cause to insist in the present action of divorce against the defender [his spouse, or her husband], because he [or she] believes that she [or he] has been guilty of adultery [or that she (or he) has wilfully deserted him (or her)], and that the facts stated in his [or her] libel, which has been read over to him [or her] are true. Depones that there has been no concert or collusion between him [or her] and the said defender in raising this action in order to obtain a divorce, nor does he [or she] know, believe, or suspect that there has been any concert or agreement between any other person on his [or her] behalf, and the defender or any other person on her [or his] behalf with the view or for the purpose of obtaining such divorce. All which is truth, as the deponent shall answer to God.

(Signed by the pursuer and the Judge.)

SUBSECTION (3).—*Proof.*

**45.** Evidence must be led whether the action is defended or not.<sup>2</sup> Where necessary, the whole evidence even may be taken on commission.<sup>3</sup> The marriage must first be proved, usually by production of an extract from the register of marriages, which is now evidence,<sup>4</sup> and by some person or persons who were present at the marriage. If necessary the pursuer must satisfy the Court that the marriage was valid, *e.g.* if a prior marriage be alleged<sup>5</sup> or the impotence of the pursuer be pled.<sup>6</sup> If the marriage has been an irregular one and has not been registered, it may be necessary to insert in the summons a conclusion for declarator of the marriage and to prove the exchange of consent *de præsenti*, promise *subsequente copula*, or habit and repute.

**46.** The parties are competent and compellable witnesses, but no witness shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness should have already given evidence in the same proceeding in disproof of his or her alleged adultery.<sup>7</sup> This does not mean that the judge is to prevent such a question from being put, but only that the judge must see that the witness understands the protection of the Act

<sup>1</sup> Fraser, H. & W. ii. 1196; *Paul v. Laing*, 1855, 17 D. 604; Walton, H. & W., 2nd ed., p. 272; but see *Greenhill v. Ford*, 1822, 1 S. 296; *affd.* 2 S. App. 435.

<sup>2</sup> 11 Geo. IV. and 1 Will. IV. c. 69, ss. 33 and 36.

<sup>3</sup> *A. B. v. C. B.* (O.H.), 1911, 1 S.L.T. 264.

<sup>4</sup> 17 & 18 Vict. c. 80, s. 58.

<sup>5</sup> *Sharp v. Sharp*, 1898, 25 R. 1132; *M'Donald v. M'Donald* (O.H.), 1924, S.L.T. 200.

<sup>6</sup> *C. B. v. A. B.*, 1885, 12 R. (H.L.) 36.

<sup>7</sup> 37 & 38 Vict. c. 64, s. 2.

and is willing to answer the question before he is called upon to answer.<sup>1</sup> If the witness is willing to answer the defender has no right to object.<sup>1</sup> If the witness is not willing to answer, neither the question nor the declinature to answer must appear in the notes, and no judicial notice must be taken of the refusal.<sup>2</sup> The paramour is a competent witness for the pursuer<sup>3</sup> even although he is being sued for damages in the same or in another action.<sup>3</sup> The wife of the paramour is also a competent witness for the pursuer, although the effect of her evidence may be to convict her husband of adultery.<sup>4</sup>

47. Where the defender has been cited as a witness or appointed to appear for identification and is not present at the proof, it is the common practice to allow a photograph to be shewn to the witnesses.<sup>5</sup>

#### SECTION 7.—RECOGNITION OF FOREIGN DIVORCE.

48. If a Scotsman acquires a foreign domicile and obtains a divorce or is divorced in the foreign country, the divorce will be recognised as valid if granted for a cause sufficient to justify dissolution of the marriage by our law.<sup>6</sup> And it is thought that even if granted upon a ground not admitted in Scotland it would be treated as valid if it was for a serious matrimonial offence, as, *e.g.*, cruelty.<sup>7</sup> Whether it would be recognised if granted for incompatibility of temper or some like ground is more doubtful.<sup>8</sup> But a foreign divorce will not be recognised if it is granted by the Court of a country in which the husband was never domiciled,<sup>9</sup> or if it is shewn that it was obtained by fraud or collusion.<sup>10</sup>

#### SECTION 8.—REDUCTION OF DECREE OF DIVORCE.

49. A decree of divorce may be reduced on the ground that the witnesses were suborned to give false evidence or that the decree was procured by fraud or collusion.<sup>11</sup> In an American case in which a hus-

<sup>1</sup> *Kirkwood v. Kirkwood*, 1875, 3 R. 235; *Bannatyne v. Bannatyne*, 1886, 13 R. 619.

<sup>2</sup> *Cook v. Cook*, 1876, 4 R. 78; *Hunt v. Hunt*, 1893 (O.H.), 1 S.L.T. 157.

<sup>3</sup> *Don v. Don*, 1848, 10 D. 1046; *Nicolson v. Nicolson*, 1770, Mor. 16770; *Hay Marshall v. Anderson*, 1798, Mor. 16787.

<sup>4</sup> *Auld v. Auld*, 1874, 1 R. 1015.

<sup>5</sup> *L. v. L.*, 1890, 17 R. 754; *Cassidy v. Cassidy*, 1893 (O.H.), 1 S.L.T. 358.

<sup>6</sup> *Harvey v. Farnie*, 1882, 8 App. Cas. 43; *Carswell v. Carswell*, 1881, 8 R. 901; *Humphrey v. Humphrey's Trs.*, 1895, 33 S.L.R. 99; *Manderson v. Sutherland*, 1899, 1 F. 621, per Lord Kyllachy at p. 623; *Le Mesurier v. Le Mesurier*, [1895] A.C. 517; *Walton, H. & W.*, 2nd ed., p. 365; but see *Fraser, H. & W.* ii. 1331.

<sup>7</sup> *Humphrey*, *supra*.

<sup>8</sup> *Jack v. Jack*, 1862, 24 D. 467, at p. 472; *Pitt v. Pitt*, 1864, 4 Macq. 627, at p. 640; *Harvey v. Farnie*, 1880, 6 P.D. 35, at pp. 47 and 49; and see *Ringer v. Churchill*, 1840, 2 D. 307, per Lord Mackenzie at p. 316 and Lord Medwyn at p. 313; in England apparently it would be recognised, *Pemberton v. Hughes*, [1899] 1 Ch. 781.

<sup>9</sup> *Redding v. Redding*, 1888, 15 R. 1102; *Calder v. Calder*, 1900 (O.H.), 8 S.L.T. 336; *Shaw v. Attorney-General*, 1870, L.R. 2 P. & D. 156; *Green v. Green*, [1893] P. 89; *Briggs v. Briggs*, 1880, 5 P.D. 163.

<sup>10</sup> *Bonaparte v. Bonaparte*, [1892] P. 402; *Shaw v. Gould*, 1868, L.R. 3 E. & I. App. 55.

<sup>11</sup> *Begg v. Begg*, 1889, 16 R. 550; *Walker v. Walker*, 1911 S.C. 163; see *Bonaparte*, *supra*.

band had induced his wife, by false and fraudulent statements, not to defend the action, the decree was afterwards set aside.<sup>1</sup> It would seem that mere averments that the decree was procured by perjury, without any allegation of subornation, would not be relevant.<sup>2</sup> A decree of divorce may be reduced also on the ground of want of jurisdiction in the Court operating the decree.<sup>3</sup> Reduction is competent until twenty years after decree,<sup>4</sup> or at any time on the ground of fraud.<sup>5</sup>

# SECTION 9.—EFFECTS OF DIVORCE.

## SUBSECTION (1).—*Effects on Person and Capacity of Spouses.*

50. Divorce, as already stated, severs the bond of marriage. The marriage comes to an end at the date of the decree by the Lord Ordinary unless his judgment should be reversed by the Inner House or by the House of Lords.<sup>6</sup> After the expiration of the reclaiming days either spouse of the dissolved marriage is free to marry again,<sup>7</sup> and even after decree by the Lord Ordinary and before the reclaiming days have expired there seems to be no impediment to a second marriage, although this will be a nullity if the decree granting divorce is reversed on appeal.<sup>8</sup> The second marriage of a divorced person, at whatever time contracted, will be rendered invalid if the decree of divorce should afterwards be reduced upon any sufficient ground, as, *e.g.*, that it was procured by fraud, or that the Court which granted the divorce had no jurisdiction over the parties.<sup>9</sup> By the Act 1600, c. 20, the marriage of a spouse divorced in Scotland for adultery, if contracted with a paramour named in the decree, is null.<sup>10</sup> See MARRIAGE. This statute is not in desuetude.<sup>11</sup> In practice the paramour is not now named in the decree.

51. The usual prayer of a summons of divorce is that the pursuer should be found entitled to marry any free man (or woman, as the case may be) as if she had never been married to the defender or as if he were naturally dead. Probably the words “or as if he were naturally dead” would be read as exegetical of or as limiting those preceding: for it is hard to see upon what principle it would be held that divorce severs the tie of affinity between either spouse and the relations of the

<sup>1</sup> *Colby v. Colby*, 1894, 50 Amer. Rep. 426.

<sup>2</sup> See *Lockyer v. Ferryman*, 1876, 3 R. 882; *affd.* 1877, 4 R. (H.L.) 32; *Begg, supra*; *Fraser, H. & W. ii.* 1236.

<sup>3</sup> *Corbridge v. Somerville*, 1913 S.C. 858.

<sup>4</sup> *Ibid.*; 31 & 32 Vict. c. 100, s. 24.

<sup>5</sup> *Lockyer v. Ferryman, supra*; 4 R. (H.L.), per Lord Hatherley at p. 39 and Lord Blackburn at p. 43.

<sup>6</sup> See *Robertson v. Robertson*, 1888, 15 R. 1001.

<sup>7</sup> *Ersk. i.* 6, 43; *Fraser, H. & W. ii.* 1266.

<sup>8</sup> In England a second marriage is not lawful as long as appeal is possible or when an appeal is taken, until it has been disposed of (20 & 21 Vict. c. 85, s. 57).

<sup>9</sup> *Begg v. Begg*, 1889, 16 R. 550; *Bonaparte v. Bonaparte*, [1892] P. 402, and see para. 49, *supra*.

<sup>10</sup> More, Notes to Stair, xvi.; *Ersk. i.* 6, 43; see *Campbell v. Campbell*, 1866, 4 M. 867.

<sup>11</sup> *Beattie v. Beattie*, 1866, 5 M. 181; *Fraser, H. & W. i.* 144; *Bell's Prin.*, s. 1526.



other, so as to make any marriage lawful which would not have been so if the first marriage had been dissolved by death and not by divorce. After divorce the former wife retains her husband's domicile, but is free to change it.<sup>1</sup> A woman divorced for adultery who marries the paramour (whether named in the decree or not), or plainly and openly dwells with him at bed and board, is disabled from disposing her heritage to him, or to the children of the second marriage, or to any other person in prejudice of her lawful heirs.<sup>2</sup> Erskine says that the disability extends to onerous as well as to gratuitous deeds.<sup>3</sup>

### SUBSECTION (2).—*Effects on Property.*

52. On divorce the innocent spouse comes into immediate enjoyment of all rights, legal or conventional, in the estate of the offender or the funds settled by the marriage contract as if the guilty spouse had died at the date of the decree.<sup>4</sup> This rule, however, does not apply to the husband's statutory *jus relictii*.<sup>5</sup> The *punctum temporis* looked at is the date of the decree. The innocent spouse has no interest in rights which do not emerge to the guilty till after divorce.<sup>6</sup> On the other hand, the guilty spouse is not barred by divorce from claiming a fund which had vested in him before its date but had not been paid.<sup>7</sup> In the case of divorce for desertion, the Act 1573, c. 55, provides "the said partie offendar to tyne and lois their tocher *et donationes propter nuptias*." These words have in practice always been held to cover all provisions, legal and conventional.<sup>8</sup> In the case of divorce for adultery the same rule seems to have been followed even where, before the Reformation, divorce was only granted *a mensa et thoro*.<sup>9</sup> It was held in one case that a husband divorced for adultery was not bound to restore a tocher which had been paid in cash and immixed with his funds.<sup>10</sup> The grounds of this decision, which is not disapproved of in the case of *Harvey*,<sup>8</sup> would apply equally in the case of divorce for desertion.<sup>11</sup> If the words of the Act of 1573 mean that the husband divorced for desertion must restore a tocher paid in cash, a husband divorced for adultery is, according to the case of *Justice v. Murray*,<sup>10</sup> in a better position. With this possible exception it is now settled that the effects of divorce are the same whether the ground be adultery or desertion.<sup>12</sup>

<sup>1</sup> See para. 97, *infra*.

<sup>2</sup> Act 1592, c. 119 (Thomson's ed., cii.); Fraser, H. & W. ii. 1224; *Irvine v. Skeen*, 1707, Mor. 6350 and 9471.

<sup>3</sup> Ersk. ii. 3, 66; Fraser, H. & W. ii. 1224.

<sup>4</sup> Stair, i. 4, 20; Ersk. i. 6, 48; Fraser, H. & W. ii. 1266; Walton, H. & W., 2nd ed., p. 200.

<sup>5</sup> *Eddington v. Robertson*, 1895, 22 R. 430.

<sup>6</sup> *Elgin v. Fergusson*, 1827, 5 S. 243 (N.E. 226).

<sup>7</sup> *Ferguson v. Jack's Exrs.*, 1877, 4 R. 393.

<sup>8</sup> Stair, i. 4, 20; Ersk., i. 6, 48; see *Harvey v. Farquhar*, 1870, 8 M. 971; 1872, 10 M. (H.L.) 26.

<sup>9</sup> See *Harvey*, *supra*.

<sup>10</sup> *Justice v. Murray*, 1761, Mor. 334; see *Ferguson v. Jack's Exrs.*, *supra*.

<sup>11</sup> See Ersk. i. 6, 47; Fraser, H. & W. ii. 1222.

<sup>12</sup> Fraser, H. & W. ii. 1266; *Harvey v. Farquhar*, *supra*; *Harvey's J.F. v. Spittal's Curator*, 1893, 20 R. 1016, per Lord Kyllachy.



53. In accordance with the doctrine stated above, the innocent wife who has obtained a divorce, if her legal rights have not been excluded by marriage contract, becomes at once entitled to one-third of the rents of her husband's heritage in name of Terce (*q.v.*), and to one-half or, if there are children surviving, one-third of the capital of his movable estate in name of *Jus relictæ* <sup>1</sup> (*q.v.*). Similarly the innocent husband becomes entitled to the liferent of his wife's heritage in name of Courtesy <sup>2</sup> if the conditions are present on which that right depends.<sup>3</sup> But he is not entitled to claim the right, conveniently called *jus relictæ*, created by the Married Women's Property Act, 1881,<sup>4</sup> as arising in respect of a decree of divorce.<sup>5</sup> Conversely, the guilty spouse loses all claim to legal rights on the death of the innocent spouse.<sup>6</sup>

54. The innocent spouse is entitled to claim at once all marriage-contract provisions made in her or his favour by the guilty spouse or by anyone on his or her behalf. So an annuity provided by the husband's father, in an antenuptial marriage contract, to his son, whom failing, to his son's wife, becomes payable at once to the wife if she divorce the husband; <sup>7</sup> and where the annual proceeds of funds derived partly from the husband's and partly from the wife's side were to be paid to the husband during their joint lives, and to the survivor on the dissolution of the marriage by death, it was held on the husband being divorced that the whole annual proceeds must be paid to the wife during her life.<sup>8</sup> But the rule has no application to a bond of annuity granted under the Aberdeen Act by an heir of entail in possession, providing an annuity to his wife on her survivance of himself: for such a bond imposes no personal obligation on the granter, and the grantee's right is measured by her infestment.<sup>9</sup> As regards contingent interests which may emerge if the guilty spouse survives the innocent, a distinction is drawn. The guilty spouse loses for ever all interest in funds paid or undertaken to be paid by the innocent spouse or his or her relations.<sup>10</sup> But the contingent interest of the guilty spouse in funds proceeding from his side is not extinguished by the divorce, and he will enter upon or resume the enjoyment of these if the innocent spouse, who has been taking the annual proceeds, should be the predeceaser.<sup>11</sup> It is only in a question between the spouses that divorce will be held as equivalent to the natural death of the offender in construing a marriage contract. In a question with children, such words as "survivor," "dissolution of the marriage by

<sup>1</sup> *Johnstone Beattie v. Johnstone*, 1867, 5 M. 340; *M'Elmail v. Lundie's Trs.*, 1888, 16 R. 47.

<sup>2</sup> See *ante*, Vol. V. p. 44.

<sup>3</sup> *Innerwick*, 1589, Mor. 329.

<sup>4</sup> 44 & 45 Vict. c. 21.

<sup>5</sup> *Eddington v. Robertson*, 1895, 22 R. 430.

<sup>6</sup> *Stair*, Ersk., Fraser, *ubi cit.*; *Ritchie v. Ritchie's Trs.*, 1874, 1 R. 987; *Somervell's Tr. v. Dawes*, 1903, 5 F. 1065; cf. *Towse's Tr. v. Towse* (O.H.), 1924, S.L.T. 465.

<sup>7</sup> *Johnstone Beattie v. Johnstone*, *supra*.

<sup>8</sup> *Harvey v. Farquhar*, 1872, 10 M. (H.L.) 26.

<sup>9</sup> *Somervell's Tr. v. Dawes*, *supra*.

<sup>10</sup> *Johnstone Beattie v. Dalzell*, 1868, 6 M. 333; *Ritchie v. Ritchie's Trs.*, *supra*; *Hedderwick v. Morison*, 1901, 4 F. 163.

<sup>11</sup> *Harvey's J.F. v. Spittal's Curator*, 1893, 20 R. 1016.

death," and the like will be read in their ordinary sense, and rights which, under the contract, are to vest in children at the death of the husband will not vest on his being divorced.<sup>1</sup>

55. Testamentary bequests to the innocent spouse not made *intuitu matrimonii*, payable on the dissolution of the marriage by death, will not become payable on his or her obtaining a divorce unless this intention is clearly indicated by the terms of the bequest.<sup>2</sup> And rights flowing from third parties *stante matrimonio* and not granted *intuitu matrimonii*, e.g. a tack granted to a man and his wife and the survivor, will not be affected by the divorce.<sup>3</sup> Under the law prior to the Married Women's Property (Scotland) Act, 1920,<sup>4</sup> donations made by the innocent spouse to the guilty were revoked *ipso facto* by the divorce, while those made by the guilty spouse became irrevocable at the date of the decree or, according to one decision, after commission of the offence for which decree was granted.<sup>5</sup> Donations between husband and wife are now irrevocable,<sup>6</sup> and it is thought are not affected by divorce.

56. Where there are cross actions, both of which succeed, neither spouse has any claim on the property of the other. The effect is the same as if both had died at the date of the decree.<sup>7</sup>

57. Where decree of divorce has been granted to a wife in Scotland and the decree stands unreduced, the Court has jurisdiction to entertain an action by the wife for declarator and payment of *jus relictæ*.<sup>8</sup>

<sup>1</sup> *Gavin's Trs. v. Johnston's Trs.*, 1901, 4 F. 278; *affd. sub. nom. Dawson v. Smart*, 1903, 5 F. (H.L.) 24; *Harvey's J.F.*, *supra*; *Taylor's Trs. v. Barnett*, 1893, 20 R. 1032; and see *Smith's Trs. v. Smith*, 1897, 4 S.L.T. 214.

<sup>2</sup> *Mason v. Beattie's Trs.*, 1878, 6 R. 37; *Taylor's Trs. v. Barnett*, 1893, 20 R. 1032; *Humphrey v. Humphrey's Trs.*, 1895, 33 S.L.R. 99.

<sup>3</sup> *Countess of Argyle v. Earl of Argyle*, 1573, Mor. 327 and 6184; cf. *Brack-Boyd-Wilson v. Pearson (O.H.)*, 1908, 15 S.L.T. 1046.

<sup>4</sup> 10 & 11 Geo. V. c. 64.

<sup>5</sup> *Murray v. Livingston*, 1576, Mor. 328, 2nd report; *Ersk. i. 6, 31*; *Fraser, H. & W. ii. 1224*.

<sup>6</sup> 10 & 11 Geo. V. c. 64, s. 5.

<sup>7</sup> *Fraser v. Walker*, 1872, 10 M. 837.

<sup>8</sup> *Manderson v. Sutherland*, 1899, 1 F. 621

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## DOCK WARRANT.

See DOCUMENT OF TITLE.

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## DOCQUET.

See DEEDS, EXECUTION OF; COMPLETION OF TITLE.

# DOCUMENT OF TITLE.

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### SECTION 1.—INTRODUCTION.

**58.** From early times the mercantile community has made use of documents for the purpose of transferring rights to goods. When such documents came before the Courts there was difficulty (except in the case of bills of lading) in giving effect to the mercantile custom of recognising them as a means of transferring property in goods, and it was not until between 1860 and 1870 that their exact effect at common law and the rules governing them were made clear. There has, however, been a considerable amount of legislation affecting mercantile paper, and the law applicable is to a large extent contained in the Factors Act, 1889,<sup>1</sup> and the Sale of Goods Act, 1893.<sup>2</sup> In this article it is proposed to consider first the common law applicable to documents of title, and secondly to what extent the common law has been altered by statute.

### SECTION 2.—COMMON LAW.

#### SUBSECTION (1).—*Description.*

**59.** A document of title is a document the transfer of which either enables the transferee to complete, or is itself sufficient to transfer to the transferee, a right of property in the goods which are described in and are said to be represented by the document. Three qualifications must be added to this description. First, the transfer must be made by the owner or with his authority express or implied. Secondly, the transfer must be effected by the method appropriate to the particular document. Thirdly, the expression “represented by the document” is not wholly accurate and does not indicate the legal theory on which property is passed. The expression, however, has judicial authority,

<sup>1</sup> 52 & 53 Vict. c. 45.

<sup>2</sup> 56 & 57 Vict. c. 71.



and is convenient in practice. "A document of title is something which represents the goods, and from which, either immediately or at some future time, the possession of the goods may be obtained. In this way a bill of lading represents the goods while they are at sea, and by which (*sic*), when the goods arrive at the port of destination, the possession of the goods may be obtained. So also a delivery order is an order for the delivery of the goods either immediately or at some future time. Therefore it represents the goods."<sup>1</sup>

60. As is explained later, it is impossible to tell, except perhaps in the case of a bill of lading, whether any particular document is a document of title in the sense above described without reference to the physical situation of the goods it purports to represent. The expression "document of title," however, is often used in a wider sense to include documents which, although in form they appear to be documents of title, are not in fact so, because owing to the physical situation of the goods which they purport to represent, no right of property is or can be completed in the transferee.

61. The law of documents of title is thus intimately connected with that of the transfer of property in goods. The basis upon which the common law stands is the maxim, *Traditionibus non nudis pactis dominia rerum transferuntur*. But the necessary delivery may be actual, constructive or symbolic. Actual delivery places the thing within the grasp and in the personal apprehension of the transferee. Constructive delivery involves a change of constructive possession without any change in the actual custody. This takes place chiefly where goods are in the custody of a third person such as a storekeeper, whose possession, formerly held for the transferor, will, after constructive delivery, be attributed to the transferee. Constructive delivery takes place at the moment when intimation is made to the custodian that his possession is no longer for the transferor, but for the transferee.<sup>2</sup> Where A agrees to transfer the property in goods to B, and the transfer is to be effected by constructive delivery, B is the person who has the interest to intimate to the custodian the change of possession, because to complete his right of property he must obtain delivery. But the custodian does not know B; he knows only A. Therefore A must enable B to vouch the fact that he is authorised to intimate the change of possession. This might be done by A and B appearing together at the store and verbal intimation, but it is frequently done in writing. A hands B a document authorising him to go to the custodian and make the intimation which effects constructive delivery. Such a document if it fulfils the requirements described later is a document of title. The chief types are delivery orders and store warrants.

62. In symbolic delivery a document is regarded as the symbol of the goods described therein, and transfer of the document is equivalent

<sup>1</sup> *Gunn v. Bolckow, Vaughan & Co.*, 1875, L.R. 10 Ch. 491, at p. 502.

<sup>2</sup> *Black v. Incorporation of Bakers, Glasgow*, 1867, 6 M. 136, at pp. 141 and 142.



to actual delivery of the goods. A bill of lading is the only document of this kind. Probably symbolic delivery is a type of constructive delivery really depending upon a theoretical change of possession. This seems to have been the principle of the early cases,<sup>1</sup> but the necessity of intimation to the shipowner was dispensed with owing to the practical difficulties. In this way law kept abreast of mercantile requirements. Bills of lading are documents of title.

SUBSECTION (2).—*Classes of Documents of Title.*

(i) *Bills of Lading.*

**63.** When goods are loaded on a ship and a bill of lading acknowledging receipt and undertaking to deliver them at the port of destination is signed by or on behalf of the shipowner and delivered to the shipper, the bill of lading becomes the symbol of the goods and continues to represent them until they are delivered up by the shipowner to some person who presents the bill of lading.<sup>2</sup> The issue of the bill of lading does not affect the rights of the shipper in regard to the goods. If he was not already owner of them, possession of the bill of lading does not give him any greater right than he had before. If he was owner he is equally unaffected, but the possession of the bill of lading enables him by transferring it to pass the property in the goods without giving actual delivery of them. The method of transfer depends upon the nature and extent of the shipowner's undertaking. This may be to deliver to the shipper or his order or assigns or to a named consignee or his order or assigns. The person named as the person entitled to delivery may either indorse the bill of lading to another named person, *i.e.* by special indorsement, or he may simply indorse it in blank. In the first case delivery of the bill of lading to the person to whom it is indorsed transfers to him the property in the goods. In the second case delivery of the bill of lading, blank indorsed, transfers the property to the person to whom it is delivered. No intimation to the shipowner is required in either case. Any number of transfers by indorsement and delivery, or by delivery alone, may be made.

**64.** Bills of lading are issued in sets, and while a shipper or consignee may transfer bills purporting to represent the same goods to different people, the first transfer alone passes the property, and subsequent transfers of other bills are of no effect.<sup>3</sup> The shipowner, however, if he has no notice of any competing right, is entitled to deliver the goods to the first party presenting a bill of lading,<sup>4</sup> although some other bill of the set has already been transferred and has passed the property in the goods so that the person presenting the bill is not in fact the owner.

<sup>1</sup> *Bogle v. Dunmore & Co.*, 1787, Mor. 14216.

<sup>2</sup> *Hayman v. M'Lintock*, 1907 S.C. 936, at p. 951.

<sup>3</sup> *Barber v. Meyerstein*, 1870, L.R. 4 H.L. 317.

<sup>4</sup> *Glyn Mills & Co. v. East and West India Dock Co.*, 1882, 7 App. Cas. 591.

65. As has already been pointed out, it is necessary in some cases to consider the physical situation of the goods before it can be said that transfer of a document will pass property in goods. But a doubt was indicated as to whether this limitation applied to bills of lading. There are two points: first, whether the goods are specific, and second, whether they are in the custody of an independent person. With regard to the first there is an opinion by Lord M'Laren<sup>1</sup> that transfer of a bill of lading will transfer property although the goods are not specific. It is difficult on principle to see how this can be so. Lord M'Laren's opinion, which was *obiter*, has been severely criticised,<sup>2</sup> and the point must be regarded as still unsettled at common law. Under the Sale of Goods Act, s. 16, property cannot pass until the goods are ascertained: this makes it still more difficult to accept Lord M'Laren's dictum, which was uttered in a case where that section was actually before the Court.<sup>3</sup>

66. The second point with regard to bills of lading is whether it is necessary that the shipmaster should be an independent custodian, or whether, if the ship belongs or is demised to the owner of the goods, transfer of property by transfer of the bill of lading is still possible. This question might arise in trades like the fruit trade, or the oil trade, where the same company often owns both ship and cargo. In England it has been held that in such circumstances the company may be regarded as two separate persons. "The delivering of goods contracted for on board a ship when a bill of lading is taken is not delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and this may equally apply when the ship is the ship of the vendee."<sup>4</sup> This separation of interests has not been recognised in Scotland in a case of constructive delivery.<sup>5</sup> The point is not likely to arise in practice, and possibly the Court will not feel itself bound to apply the strict rules of constructive delivery.

(ii) *Received for Shipment Bills of Lading.*

67. There has come into use a new form of document, the received for shipment bill of lading. This document is in the same form as an ordinary bill of lading except that, instead of acknowledging receipt on board, it merely acknowledges that the goods have been received for shipment either by a named ship<sup>6</sup> or by any ship of a particular description.<sup>7</sup> There seems to be no reason to doubt that such a document is a document of title if it represents specific goods, but it is not clear whether it falls within the same class as true bills of lading or whether it is more of the nature of a storekeeper's warrant. Contradictory

<sup>1</sup> *Hayman v. M'Lintock*, 1907 S.C. 936, at p. 952.

<sup>2</sup> Brown, *Sale of Goods Act*, 2nd ed., p. 182 *et seq.*

<sup>3</sup> 1907 S.C. at p. 951.

<sup>4</sup> *Gabarron v. Kreeft*, 1875, L.R. 10 Ex. 274, at p. 285.

<sup>5</sup> *Anderson v. M'Call*, 1866, 4 M. 765.

<sup>6</sup> See *Diamond Alkali Export Corporation v. Bourgeois*, [1921] 3 K.B. 443.

<sup>7</sup> See *Weis & Co. v. Produce Brokers Co.*, 1921, 7 Ll. L.R. 211.

views have been expressed.<sup>1</sup> The importance of the distinction is that intimation to the custodier is not required in the former case and is in the latter.

(iii) *Delivery Orders.*

68. A delivery order is a document issued by the owner of goods and addressed to the keeper of the warehouse where they are stored, ordering him to deliver some or all of these goods to a person named in the document or order. Such a document is a document of title if two conditions are present. First, the storekeeper must be an independent third party,<sup>2</sup> and not merely an agent or servant of the granter.<sup>3</sup> Secondly, the goods must be specific.<sup>4</sup> If the goods are not specific when the order is issued, but later become so, the order becomes a document of title as soon as they become specific.<sup>5</sup> When the document of title is handed to the person named and intimated by him to the storekeeper, constructive delivery is effected.

69. If either the goods are not specific, or the custodian is not an independent third party, the order is not a document of title, but it is not without effect. If the goods are not specific, transfer of the document followed by intimation to the storekeeper will operate as an assignation to the grantee of the personal right which the granter had to call upon the storekeeper to deliver goods as described in the document.<sup>6</sup> If the goods are in the custody of the granter of the order, a transfer of the order will assign the right which the original grantee of the order had against the granter to call for delivery of the goods.<sup>7</sup>

(iv) *Store Warrants.*

70. Under this head may be included all documents, such as store warrants and dock warrants, in which a custodier acknowledges that he holds goods and undertakes to deliver them to a person named in an order. If the custodier be an independent third party and the goods be specific,<sup>8</sup> such documents are documents of title. The issue of the document alters no rights. In practice it will only be issued to a person who already has the property in the goods, either because they were already his when placed in the store, or because he has obtained constructive delivery of them in the store. But the holder of the document

<sup>1</sup> "*Marlborough Hill*" (Ship) v. *Cowan & Sons*, [1921] 1 A.C. 444; *Diamond Alkali Export Corporation v. Bourgeois*, [1921] 3 K.B. 443.

<sup>2</sup> *Pochin v. Robinows & Marjoribanks*, 1869, 7 M. 622, at p. 629.

<sup>3</sup> *Anderson v. M'Call*, 1866, 4 M. 765.

<sup>4</sup> *Pochin v. Robinows & Marjoribanks*, *supra*; *Price & Pierce v. Bank of Scotland*, 1910 S.C. 1095.

<sup>5</sup> *Price & Pierce v. Bank of Scotland*, *supra*, at p. 1121; *Black v. Incorporation of Bakers, Glasgow*, 1867, 6 M. 136, at pp. 141 and 143.

<sup>6</sup> *Pochin v. Robinows & Marjoribanks*, *supra*, at pp. 629, 630, 635, and 638.

<sup>7</sup> *Distillers Co., Ltd. v. Russell's Tr.*, 1889, 16 R. 479, at pp. 486, 500, and 503.

<sup>8</sup> *Connal v. Loder*, 1868, 6 M. 1095, at pp. 1102 and 1105.



may, by indorsing and delivering it, authorise a third party to obtain constructive delivery by intimation to the custodier.<sup>1</sup>

SUBSECTION (3).—*Document of Title as a Security Writ.*

**71.** Goods cannot be pledged by means of a document of title, because constructive delivery does not give that custody which is of the essence of pledge. The true contract between the parties may be that the goods are to be held in security, but that is immaterial as regards the quality of the real right obtained by the transferee. His title is substantially identical with that of the holder of a security over heritable property constituted by an *ex facie* absolute disposition.<sup>2</sup>

SUBSECTION (4).—*Documents of Title not Negotiable Instruments.*

**72.** Documents of title are not negotiable instruments. A transferee does not acquire a better title to the goods than the transferor had.<sup>3</sup> But where an indorsee has a right to possession of a document of title, but no right to transfer it, the granter may be barred from challenging the title of one taking in good faith from the indorsee.<sup>4</sup>

SECTION 3.—STATUTE LAW.

SUBSECTION (1).—*General.*

**73.** The Factors Act, 1889,<sup>5</sup> which is extended to Scotland by the Factors (Scotland) Act, 1890,<sup>6</sup> and the Sale of Goods Act, 1893,<sup>7</sup> contain provisions relative to documents of title. So far as these provisions are concerned the Factors Act deals chiefly with sales or pledges by mercantile agents (see AGENCY), and the Sale of Goods Act with dispositions by sellers and buyers of goods in possession (s. 25), with the effect on the seller's rights of retention and stoppage *in transitu* of a sub-sale or pledge by the buyer (s. 47) (see SALE OF GOODS), and with delivery when goods are in the possession of a third person (s. 29) (see MOVEABLES, DELIVERY OF). Here it is proposed only to consider whether in these Acts the expression "documents of title" has any different meaning from that which it has at common law.

SUBSECTION (2).—*Definitions.*

**74.** The Factors Act enacts (s. 1 (4)): "The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-

<sup>1</sup> *Inglis v. Robertson & Baxter*, 1898, 25 R. (H.L.) 70.

<sup>2</sup> *Hamilton v. Western Bank of Scotland*, 1856, 19 D. 152; *Hayman v. M'Lintock*, 1907 S.C. 936.

<sup>3</sup> *Colvin v. Dixon*, 1867, 5 M. 603; *Hamilton v. Dixon*, 1873, 1 R. 72; *Martinez y Gomez v. Allison*, 1890, 17 R. 332.

<sup>4</sup> *Pochin v. Robinows & Marjoribanks*, 1869, 7 M. 622, at pp. 630, 634, 637, and 638.

<sup>5</sup> 52 & 53 Vict. c. 45.

<sup>6</sup> 53 & 54 Vict. c. 40.

<sup>7</sup> 56 & 57 Vict. c. 71.



keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

The Sale of Goods Act enacts (s. 64 (1)): "'Document of title to goods' has the same meaning as it has in the Factors Acts."

### SUBSECTION (3).—*Effects upon Common Law.*

**75.** Whether this definition extends the common law conception of a document of title is not an easy question. At common law there is no doubt that any of the documents enumerated might be a document of title, and would be, provided the goods were specific and were in the possession of an independent custodian. From its terms the statutory definition appears to require at least the first of these conditions. It implies that the document must be one used as proof of the possession or control of goods, and speaks of the goods thereby represented. This seems to point to the goods being specific. If the goods are not specific it is impossible to say what are the goods of which the document proves possession or control, or what goods it represents. So far as the definition goes, there is nothing to suggest whether independent custody is necessary or not. The House of Lords, however, decided in 1871 that if a document fell within the definition in the Factors Act, 1842, which was in substance identical with that in the Factors Act, 1889, it was a document of title although the goods were not specific and although they were in possession of the owner. In *Vickers v. Hertz*<sup>1</sup> the documents were a delivery order and a store warrant for iron. The iron was not specific and was in the possession of the owner. It was held that transfer of the documents passed a real right to the transferee. The case was complicated by the fact that, subsequent to the transfer of the documents, iron to the amount mentioned in the documents was actually delivered by the owner to the holder of the documents. The iron was thus made specific afterwards, and it was easy to speak of "the iron" and the documents as "symbols of property." But at the time when the documents passed no one could have pointed to "the iron." In *Pochin v. Robinows & Marjoribanks*,<sup>2</sup> where the facts were identical, the Court of Session reached a similar result in favour of the security holder, but on different grounds. They held that the documents passed a personal right only, but that a real right was constituted by the actual delivery of the iron, and only to the extent to which it was delivered. The tenor of the judgments of the majority in the Court of Session in *Robertson & Baxter v. Inglis*<sup>3</sup> is to the effect that under the Factors Act the completion of a real right by documents of title is still regulated by the common law.

<sup>1</sup> 1871, 9 M. (H.L.) 65.

<sup>2</sup> 1869, 7 M. 622.

<sup>3</sup> 1897, 24 R. 758.

**76.** So far as the law of sale is concerned, the decision in *Vickers v. Hertz* is superseded. By s. 16 of the Sale of Goods Act, where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained. Transfer of a delivery order or warrant will therefore not pass the property in goods before severance from a larger mass.<sup>1</sup> By s. 17, where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Accordingly, since delivery, actual or constructive, is no longer required to pass property in a contract of sale, the importance of independent custody has disappeared.

**77.** The law of pledge, however, is not affected by these sections of the Sale of Goods Act. Sec. 3 of the Factors Act, 1889, provides that a pledge of the documents of title to goods shall be deemed to be a pledge of the goods. This section makes an important alteration in the common law, but it has been held to apply only to pledges by mercantile agents.<sup>2</sup> *Vickers v. Hertz* is therefore now authority for this narrow and somewhat unintelligible proposition that a mercantile agent can pledge unspecific goods in the custody of their owner by pledging one of the documents mentioned in the statutory definition of document of title.

#### SECTION 4.—STAMPING.

**78.** Under the Stamp Act, 1891,<sup>3</sup> s. 1 and First Schedule, a duty of sixpence is payable on a bill of lading, and by s. 40 the bill of lading is not to be stamped after execution. Under ss. 1 and 111 and First Schedule, a duty of threepence is chargeable on a warrant for goods, which is defined as “any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on behalf of the person having the custody of the goods, wares, or merchandise.” The duty of one penny chargeable on delivery orders under ss. 1 and 69 and First Schedule of the same Act was abolished by the Finance Act, 1905.<sup>4</sup>

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<sup>1</sup> *Hayman v. M'Lintock*, 1907 S.C. 936, at p. 951; *Laurie & Morewood v. Dudin & Sons*, [1926], 1 K.B. 223.

<sup>2</sup> *Inglis v. Robertson & Baxter*, 1898, 25 R. (H.L.) 70.

<sup>3</sup> 54 & 55 Vict. c. 39.

<sup>4</sup> 5 Edw. VII. c. 4, s. 5 (2).

## DOCUMENTS, RECOVERY OF.

*See* COMMISSION AND DILIGENCE.

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## DOG LICENCE.

*See* EXCISE.

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## DOGS.

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# DOMICILE.

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## SECTION 1.—INTRODUCTION.

79. Domicile is defined by a recent writer on the subject as the place or country which either in fact is, or by a rule of law is determined to be, the permanent home of an individual.<sup>1</sup> It denotes a relationship which a person bears to the municipal law of the state of whose legal community he is a member. It indicates and defines his personal law; that is, the law by which his status, succession, and personal rights and privileges are to be regulated. Many of the problems of jurisprudence depend on the personal law; that is to say, they are to be solved by a law chosen with reference to the persons, and not to the other circumstances, involved in them. In this respect the legal systems of the world are divided into two great groups. In our law, and in Anglo-American jurisprudence, this choice is regulated by the domicile of the individual concerned. In continental systems, on the other hand, the modern tendency is to substitute political allegiance or nationality for domicile.<sup>2</sup> According to the theory of nationality the personal law can be changed only by a change of political allegiance; according to the theory based on domicile it is changed by a person going to a new country with the *animus manendi*.

80. For the purposes of the choice nationality has the great advantage of being both easily ascertained and capable of precise definition and regulation by the positive law of each state. But as these laws may overlap, a person runs the risk of being regarded as a subject of more than one state at the same time, and his personal law may remain in doubt on account of his double nationality. Moreover, in political systems such as those of the British Empire and the United States, where nationality is one but legal systems are many and varied,

<sup>1</sup> Dicey, Conflict of Laws, 4th ed., R. 1, p. lxi.

<sup>2</sup> See ALIENS, *ante*, Vol. I. p. 261.



the nationality of the person is an insufficient criterion of his personal rights and privileges. These depend upon the particular territorial system under which he lives, and must therefore be defined more precisely than can be done by an inquiry into his nationality alone. On the other hand, the connection of a person with a locality, which is expressed in domicile, is a natural way of fixing his personal rights and affords an adequate criterion of them. Hence even those jurists who pronounce in favour of nationality, admit recourse to domicile as an auxiliary principle.<sup>1</sup> While domicile is thus recognised as determining the status and succession of an individual, our Courts will not recognise a status unknown to our law even if it be a legal status in accordance with the *lex domicilii*, e.g. slavery, adoption, civil death, etc.<sup>2</sup>

## SECTION 2.—DOMICILE IN ROMAN LAW.

81. Though derived from the Roman law, the term “domicile” has a wider signification than the Latin *domicilium*. The latter was simply the connection between an individual and the urban community where he had established a permanent residence which subjected him to local burdens and the jurisdiction of the local Courts. A similar connection was also constituted by *origo*, which resulted from birth within the territory, or was acquired by adoption, manumission, or election as a member of the community. The same rights and liabilities were created in each case; but while those of *domicilium* could be both acquired and lost by the will of the party, the tie of *origo* was created independently of his intention or act, and was never completely dissolved. The terms *domicilium* and *origo* are thus mutually exclusive of one another, and the modern phrase “domicile of origin” would have been unintelligible to a Roman lawyer. Its use indicates that domicile in modern law embraces the characteristics of both. But the necessity for such combination could scarcely occur in the Roman jurisprudence; for while a person might refrain from establishing a *domicilium*, it was only in the most exceptional cases that he had not *origo* in some urban community, and the case of his being without a personal law depending upon one tie or the other could hardly occur.<sup>3</sup> As the law of the empire was uniform and conflicting territorial laws unknown, a criterion for the choice of personal law was not so important as in modern times, and *domicilium* and *origo* were chiefly recognised as sources of jurisdiction. For that purpose, *origo* soon ceased to be much used.<sup>4</sup>

## SECTION 3.—DEFINITION OF DOMICILE.

82. The leading definitions of domicile will be found collected in Story, ch. iii.<sup>5</sup> They are all derived from the definition of the Roman

<sup>1</sup> See Bar, s. 92a, Gillespie's trans., p. 205.

<sup>2</sup> Cf. Dicey, Conflict of Laws, 4th ed., ch. xix.

<sup>4</sup> Cf. Savigny, viii. s. 355.

<sup>3</sup> Savigny, viii. s. 351.

<sup>5</sup> See Phillimore, vol. iv. ch. iv.

law.<sup>1</sup> None of them has given entire satisfaction to English judges, but, as Dicey points out,<sup>2</sup> those of Story,<sup>3</sup> Phillimore,<sup>4</sup> and Kindersley V.-C. in *Lord v. Colvin*<sup>5</sup> give a substantially accurate explanation of its meaning. That given at the commencement of this article is the definition proposed by Dicey. Perhaps it is not so instructive as that adopted by Phillimore from an American case: "A residence at a particular place with positive or presumptive proof of an intention of continuing it an unlimited time" or that of Chitty J. in *Craignish v. Hewitt*:<sup>6</sup> "The place or country which is considered by law to be a person's home."

**83.** Into all the definitions of domicile two elements enter, *factum* and *animus*: i.e. to constitute domicile there must be (1) actual residence within the territory of some particular legal system, and (2) the intention that such residence shall be permanent or at least not for a limited period. It follows that a domicile once constituted is retained until it is changed either by the person's own act, if he is *sui juris* or, if he is a dependent person, by the act of someone on whom he is dependent.

#### SECTION 4.—EXCLUSIVENESS OF DOMICILE.

**84.** There is nothing in the Roman notion of *domicilium* to prevent a man being, in respect of it, a member of more than one urban community, and thus subject at the same time to more than one local law. But the use of domicile in modern law, as the criterion of the personal law of the individual, implies in strictness the unity of the test, and is incompatible with the co-existence of more than one domicile properly so called. "It is clear that by our law a man must have some domicile, and must have a single domicile."<sup>7</sup> This has been doubted, and it has been suggested by more than one authority that a man might have a domicile in one country for the determination of one class of rights, and a domicile in another for the determination of another. "The facts and circumstances," writes Phillimore,<sup>8</sup> "which might be deemed sufficient to establish a commercial domicile in time of war, and a matrimonial or forensic or political domicile in time of peace, might be such as according to English law would fail to establish a testamentary or principal domicile." But the notion of the plurality of domicile, in the proper sense of that term, is opposed to the principles by which the law of domicile in modern times is governed, and is not, as Dicey points out,<sup>9</sup> supported by any decided case. It proceeds truly upon a lax use of the term. Thus, commercial or trade domicile in time of war expresses a principle of public international law "by which the belligerent or neutral character of property is determined for the

<sup>1</sup> Cod. lib. x. tit. 39, 7.

<sup>3</sup> Sec. 43.

<sup>5</sup> 1859, 28 L.J. Ch. at p. 366.

<sup>7</sup> *Udny v. Udny*, 1869, 7 M. (H.L.), per Hatherley L.C. at p. 95.

<sup>8</sup> iv. s. 54.

<sup>2</sup> 4th ed., pp. 836-838.

<sup>4</sup> Sec. 49.

<sup>6</sup> [1892] 3 Ch. 180.

<sup>9</sup> Conflict of Laws, 4th ed., p. 88.

purposes of war";<sup>1</sup> while, on the other hand, the object of the law (*i.e.* international private law) in searching for and ascertaining a man's domicile has been stated to be "to ascertain the particular municipal law by which his private rights are regulated and defined."<sup>2</sup> The two legal conceptions have thus in their nature nothing in common. Again, forensic domicile, so called, implies only that a person is subject to the Courts of a particular country—a liability which may obviously arise upon a residence far short in nature and duration of that which would suffice to subject him to a complete change of his personal law, *e.g.* in the matter of his succession (see JURISDICTION). Similarly, the expression "matrimonial domicile" simply means the home of the married persons. And it is plain that spouses may, by residence in a country, subject themselves to the jurisdiction of its Courts in respect of their conjugal relations, and to many effects, without thereby giving these Courts a right to alter their status as married persons by a decree of divorce.<sup>3</sup> Recent legislation, however, gives to the Courts in India power to alter the status of married persons who have their domicile in England or Scotland subject to certain provisions.<sup>4</sup>

85. The only case in which the possibility of a man's having more than one domicile in the true and proper sense, is admitted by our law, is that which may arise under the operation of the Domicile Act, 1861.<sup>5</sup> By that statute the Crown is empowered to enter into a convention with a foreign State, to the effect that no British resident in that State, and no subject of that country resident in Britain, shall be deemed to have acquired, for the purpose of succession to moveables, a domicile in the country in which he dies, unless he has made a written declaration of intention to become domiciled there, and has otherwise complied with the requirements of the Act. No such convention has yet been concluded, and the Act therefore remains a dead letter. But if one were made with a country in which a British subject, who had not complied with the requirements of the Act, was actually domiciled at the date of his death, his succession in moveables would apparently remain unaffected, although the foreign domicile would regulate his personal law in other respects, as *e.g.* the legitimacy of his children born in the foreign country after the domicile had been acquired. In short, the effect of the Act would be to set up an arbitrary method of proving a change of domicile, but only *quoad* questions of succession.

#### SECTION 5.—LEADING CHARACTERISTICS OF DOMICILE.

86. The leading characteristics of domicile in modern law may be summed up thus:—(1) It expresses the relation of an individual to a

<sup>1</sup> Westlake, 7th ed., p. 364.    <sup>2</sup> *Craignish v. Hewitt*, [1892] 3 Ch. 180, per Chitty J.

<sup>3</sup> *Le Mesurier v. Le Mesurier*, [1895] A.C. 517. In the judgment of the Privy Council in this leading case Lord Watson examines the authorities on "matrimonial domicile" in detail. See para. 103, *infra*.

<sup>4</sup> Indian and Colonial Divorce Jurisdiction Act, 1926 (16 & 17 Geo. V. c. 40).

<sup>5</sup> 24 & 25 Vict. c. 121.



state which arises from permanent residence within its territory as a member of its community. (2) A person's domicile is the place or country which is considered by law to be his home. (3) Every person must have a domicile, and no person can at any time be without one. (4) No person can have at the same time more than one domicile in the proper sense of the term, *i.e.* for the purpose of defining and regulating his personal law. These principles, which are common to English and Scots law, are laid down and illustrated by leading decisions on the subject in both countries.<sup>1</sup>

## SECTION 6.—DOMICILE OF PERSONS SUI JURIS.

### SUBSECTION (1).—*Domicile of Origin.*

**87.** Every person who is *sui juris* has at any given moment either the domicile which the law ascribes to him at his birth, which is called his domicile of origin, or a different domicile subsequently acquired by his own act, which is called a domicile of choice.

**88.** The domicile of origin of a child born in wedlock to a living father is the domicile of its father at the time of its birth. In the case of an illegitimate or posthumous child, the domicile of origin is the domicile of its mother at the time of its birth. The domicile of origin of a child whose parents are unknown is the place or country of its birth, or, if that too be unknown, the place where it is found. The domicile of origin of a legitimated person may still be a matter of some doubt. As has been explained, the existence of a domicile of origin is a fiction or assumption of law, in order to ensure that no person may be at any time without a legal home in some country, according to the laws of which his legal rights may in many respects be determined. In the general case the fiction is based upon fact, since the home of an infant is usually that of its father. If, being illegitimate, it has in the eye of the law no father, its domicile of origin is, again consistently with fact, assigned to the home of its only relative, *viz.* its mother. The effect of legitimation by the subsequent marriage of the parents is to place the child in the position it would have occupied if born in wedlock, and a consistent application of the fiction we are dealing with would assign, as the domicile of origin, that of the father at the time of the child's birth. But no reported case has yet so decided. It may, on the other hand, be, as Prof. Dicey<sup>2</sup> points out, that though the child, if still under age, acquires on legitimation the domicile of its father at the time of its birth, its domicile of origin may remain that of the mother. Westlake's statement<sup>3</sup> is compatible with either

<sup>1</sup> *Bell v. Kennedy*, 1868, 6 M. (H.L.) 69; *Udny v. Udny*, 1869, 7 M. (H.L.) 89; *Steel v. Steel*, 1888, 15 R. 896; *Vincent v. Earl of Buchan*, 1889, 16 R. 637; *Low v. Low*, 1891, 19 R. 115; *Craignish v. Hewitt*, [1892] 3 Ch. 180; *Mackenzie's Trs. v. Mackenzie*, 1894, 2 S.L.T. 88; *Marchioness of Huntly v. Gaskell*, 1905, 8 F. (H.L.) 4; *Ross v. Ross*, 1926 S.C. 1038.

<sup>2</sup> *Conflict of Laws*, 4th ed., pp. 96-97.

<sup>3</sup> 7th ed., ss. 246-248.



view.<sup>1</sup> It may also be noted as still a moot point, whether domicile of origin, even in the case of a legitimate child, means the domicile of the father at the time of the child's birth, or the last domicile imposed by the will of the father or other guardian, who has power to change the domicile of an infant by changing his own.

SUBSECTION (2).—*Domicile of Choice.*

89. Every person who is *sui juris* can acquire, by his own act and will, a domicile different from his domicile of origin, and called a domicile of choice. "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place."<sup>2</sup> To its acquisition two things are necessary—(1) residence, and (2) intention of permanent or indeterminate residence in a particular place or country. A change of domicile can only be effected *animo et facto*, that is to say, by the choice of another domicile, evidenced by residence within the territorial limits of the jurisdiction of the new domicile. Where a party is alleged to have abandoned his domicile of origin and to have acquired a new one, it is necessary to shew that there was both the *factum* and the *animus*; there must be the act, and there must be the intention. A new domicile is not acquired "until there is not only a fixed intention of establishing a permanent residence in some other country, but until also this intention has been carried out by actual residence there."<sup>3</sup> In short, the acquisition of a domicile of choice is but the technical expression for settling in a new home or country. The concurrence of residence and intention is necessary for the acquisition of a domicile. Nothing less will do, and nothing else is required.

90. There is no precise definition of the requisite *animus manendi* in the decided cases, but Prof. Dicey deduces from an examination of them the following characteristics:<sup>4</sup>—First: the intention must amount to a purpose or choice. In order that a man may change his domicile, he must choose a new domicile—the word "choose" indicates that the act is voluntary on his part; he must choose a new domicile by fixing his sole or principal residence in a new country (that is, a country which is different from his former domicile), with the intention of residing there for a period not limited as to time.<sup>5</sup> But while the *animus* must be "voluntary," it is to be judged irrespective of "motive." Thus, a person may change his domicile though his object in settling in a new country may be to defeat his creditors,<sup>6</sup> or to obtain sequestration<sup>7</sup> or

<sup>1</sup> Cp. *Arnott v. Groom*, 1846, 9 D. 142; *Urquhart v. Butterfield*, 1887, 37 Ch. D. 357; *In re Grove, Vaucher v. Solicitor to the Treasury*, 1888, 40 Ch. D. 216.

<sup>2</sup> *Udny v. Udny*, 1869, 7 M. (H.L.) 89, per Lord Westbury at p. 99.

<sup>3</sup> *Bell v. Kennedy*, 1868, 6 M. (H.L.) 69, per Lord Chelmsford at p. 77.

<sup>4</sup> *Conflict of Laws*, 4th ed., p. 101 *et seq.*

<sup>5</sup> *King v. Foxwell*, 1876, L.R. 3 Ch. 518, per Jessel M.R. at p. 520.

<sup>6</sup> *Ex parte Robertson*, 1885, W.N. 217.

<sup>7</sup> *Joel v. Gill*, 1859, 21 D. 929.

divorce.<sup>1</sup> And, on the other hand, a person may make up his mind to settle in a country for an indefinite time, say for considerations of health, without exhibiting the *animus* necessary to effect a change of his domicile.<sup>2</sup> With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case; and each case must vary in its circumstances; and, moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight.<sup>3</sup> How far the intention must be distinct and conscious is still undetermined, and different views have been expressed.<sup>4</sup> The degree of definiteness of purpose refers rather to the evidence than to the nature of the intention. Second: the intention must be to reside permanently, or at least for an indefinite period. A limited purpose will qualify the intention, however the residence may be prolonged.<sup>5</sup> Third: it must be an intention to cease to reside permanently in the previous domicile. This follows, of course, from the principle of singleness of domicile already explained. "The intention must be to leave the place where the party has acquired a domicile, and to go to reside in some other place as the new place of domicile."<sup>6</sup> Fourth: it need not be an intention to change allegiance, or *quatenus in illo exuere patriam*. The opinion to the contrary expressed in *Moorhouse v. Lord*<sup>7</sup> has now been pronounced erroneous.<sup>8</sup>

91. With regard to the other necessary element, residence (*factum*), its duration is immaterial: "If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile."<sup>9</sup> On the other hand, mere length of residence apart from the intention, will not of itself constitute a domicile.<sup>10</sup> The two must exist together. "To constitute a domicile, there must be the fact of residence, and also a purpose on the part of the person to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary."<sup>11</sup> Intention alone, however clearly expressed, is ineffectual. Thus, where an Englishman had acquired a domicile of choice in Hamburg, where he died, the intention not to abandon his English domicile, expressed in a will which he executed in England while on a visit there, was held unavailing to qualify his actual residence in Hamburg *animo remanendi*.<sup>12</sup>

<sup>1</sup> *Carswell v. Carswell*, 1881, 8 R. 901.

<sup>2</sup> *Jopp v. Wood*, 1865, 34 L.J. Ch. 212.

<sup>3</sup> See *Hodgson v. De Beauchesne*, 1858, 12 Moore P.C. C. 285.

<sup>4</sup> Cp. *Bramwell B. in Attorney-General v. Pottinger*, 1861, 30 L.J. Exch. at p. 292, with *Wickens V.-C. in Douglas v. Douglas*, 1871, L.R. 12 Eq. at p. 645.

<sup>5</sup> *Jopp v. Wood*, *supra*; *Doucet v. Geoghegan*, 1878, L.R. 9 Ch. 441.

<sup>6</sup> *Lyall v. Paton*, 1856, 25 L.J. Ch., per *Kindersley V.-C.* at p. 749; cp. *Brooks v. Brooks's Trs.*, 1902, 4 F. 1014.

<sup>7</sup> 1863, 32 L.J. Ch. 295.

<sup>8</sup> See *Udny v. Udny*, 1869, 7 M. (H.L.) 89, per *Lord Westbury* at p. 99; *Brunel v. Brunel*, 1871, L.R. 12 Eq. 298.

<sup>9</sup> *Bell v. Kennedy*, 1868, 6 M. (H.L.) 69, per *Lord Cranworth*.

<sup>10</sup> *Winans v. Attorney-General*, [1904] A.C. 287.

<sup>11</sup> *Arnott v. Groom*, 1846, 9 D. 152, per *Lord Jeffrey*.

<sup>12</sup> *In re Steer*, 1858, 28 L.J. Exch. 22; cp. *Moffett v. Moffett*, [1920] 1 Ir. R. 57.

92. Further, the acquisition of a domicile of choice is independent of rules of foreign law; that is to say, that a person may establish himself in a foreign country in such a manner as to be deemed by our law to be in fact domiciled there, although he has not complied with the whole requirements of the foreign law, and may not therefore be entitled under it to the full civil rights of a person domiciled there.<sup>1</sup> But as no one can acquire a personal law in the teeth of that law itself, the effect to be given to the domicile so acquired (*i.e.* the possession and exercise of the rights flowing from it) will depend on the law of the country where the person is domiciled. "If by a law passed by competent authority a person resident in any country is declared not to be domiciled there, the provision must receive effect in whatever *forum* it is pleaded, for every country has the right of determining for itself under what circumstances a domicile within it shall be acquired."<sup>2</sup>

### SUBSECTION (3).—*Change of Domicile.*

93. The domicile of origin is retained until a domicile of choice is in fact acquired. "Every man's domicile must be presumed to continue until he has acquired another sole domicile by residence with the intention of abandoning his domicile of origin."<sup>3</sup> A domicile of origin, therefore, cannot be simply abandoned. A man may indeed leave the home where he has his domicile of origin without actually establishing another. But, though in fact homeless, he will, until he settles elsewhere, be considered to have his legal home in the country which he has left. He cannot give up or get rid of his domicile of origin until he has in fact changed it by settling in another country.<sup>4</sup> A domicile of choice, on the other hand, is retained only until it is abandoned, and the abandonment, like the acquisition, must be both *animo et facto*. Thus, it has been held that a French domicile by acquisition is not so abandoned by mere embarkation on a vessel bound for England, the person in question being compelled by ill health to disembark and having never in fact quitted the French harbour.<sup>5</sup> But if the country of the acquired domicile has been actually left, the domicile will be changed, though no new one has in fact been established. In such a case, if death takes place *in itinere*, the domicile of origin is held to be revived.<sup>6</sup> For "the domicile of origin is to prevail until the party has not only acquired another, but has manifested and *carried into execution* an intention of abandoning his former domicile, and taking another as his sole domicile."<sup>7</sup> Both

<sup>1</sup> *Hamilton v. Dallas*, 1875, 1 Ch. 257; see *Drexel v. Drexel*, [1916] 1 Ch. 251, per Neville J. at pp. 258–259.

<sup>2</sup> *Wauchope v. Wauchope*, 1877, 4 R., per Lord Justice-Clerk Moncreiff at p. 949.

<sup>3</sup> *Aikman v. Aikman*, 1861, 3 Macq., per Lord Wensleydale at p. 877.

<sup>4</sup> See *Vincent v. Earl of Buchan*, 1889, 16 R. 637; *Bell v. Kennedy* and *Udny v. Udny*, *supra*.

<sup>5</sup> *In Goods of Raffeneil*, 1863, 32 L.J. P. & M. 203.

<sup>6</sup> *Colville v. Lauder*, 1800, Mor. voce "Succession," App. No. 1; *Udny v. Udny*, *supra*.

<sup>7</sup> *Somerville v. Somerville*, 1801, 5 Ves. 786, per Lord Alvanley M.R.



an original and an acquired domicile, therefore, are changed by the acquisition *animo et facto* of a new domicile. The difference between them is, that while the former cannot be changed without such acquisition, the latter may be changed by simple abandonment *animo et facto*.

#### SECTION 7.—DOMICILE OF DEPENDENT PERSONS.

94. By a dependent person is meant one who has not full capacity for the acquisition and exercise of legal rights—who is not *sui juris*.

##### SUBSECTION (1).—*Domicile of Minors.*

95. The legal conception of personality involves the existence of free will and independent judgment; and as these are not found in the earliest periods of human life, the law of all civilised countries fixes an age before which they are not, and after which they are, presumed to exist. This is fixed in British law at the age of twenty-one. But the law of England differs from that of Scotland in holding that the full legal incapacity of infancy extends throughout the whole of that period. By Scots law, on the other hand, the immaturity arising from nonage is divided into two periods: (1) one of absolute incapacity, called pupillarity, extending from birth to the age of puberty, which is fixed at twelve in females, and fourteen in males; and (2) one of relative incapacity, called minority, extending from puberty to the attainment of majority at twenty-one years of age in both sexes. This difference may become of importance in questions of domicile; for while the domicile of an English “infant” is dependent upon that of his father or legal guardian, a Scots minor has the capacity to acquire, and in some circumstances might be held to have acquired, a domicile for himself.<sup>1</sup>

96. The domicile of every dependent person is the same as, and changes (if at all) with, the domicile of the person upon whom, as regards domicile, he or she is legally dependent. Thus, the domicile of a pupil depends upon, and changes with, that of the father while alive, and with that of the mother after his death. But it cannot be said that, as matter of law, the pupil’s domicile is identified with that of the widowed mother to the same extent as it is identified with that of the father during his lifetime. In point of fact, no doubt, the pupil’s domicile in such circumstances usually depends upon, and changes with, that of the mother. And the case of *Pottinger v. Wightman*<sup>2</sup> seems to settle the English doctrine, that if after the death of the father the infant continues to live with the mother, and the mother acquires a new domicile, it is communicated to the infant. But she did not in that case, as a matter of law, change the infant’s domicile simply by changing her own. Such change “is not to be regarded as the necessary con-

<sup>1</sup> See *Arnott v. Groom*, 1846, 9 D. 152; *Urquhart v. Butterfield*, 1887, 37 Ch. 357.

<sup>2</sup> 1817, 3 Mer. 67; see *Crumpton’s Judicial Factor v. Finch-Noyes*, 1918 S.C. 378.



sequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile."<sup>1</sup> Recent legislation with a view to legal equality between the sexes makes it doubtful whether the above view is strictly accurate. There appears to be no good reason for denying to the mother, being guardian, the same power to change the child's domicile by her change of domicile during widowhood as the father has during his lifetime.<sup>2</sup> It is more open to argument that a change of domicile by re-marriage of the mother should not be regarded as changing the child's domicile, if it does not live with the mother in the actual place where she becomes domiciled. The question whether a guardian, who is not the father or mother, can change an infant's domicile is undecided.<sup>3</sup> Both Westlake<sup>4</sup> and Dickey express an opinion in the negative; and the latter adds that "should the question ever arise, it will possibly be held that a guardian cannot change the domicile of his ward, and almost certainly that he cannot do this unless the ward's residence is, as a matter of fact, that of the guardian."<sup>5</sup> Probably no change would be held to be effected in the domicile of a dependent person by any act on the part of the person on whom he is dependent, done with fraudulent intent (*e.g.* to affect the distribution of the minor's estate in case of his death); or even, short of fraud, if the law of the new domicile should be less advantageous to the infant.<sup>6</sup>

#### SUBSECTION (2).—*Domicile of Married Women.*

97. A woman, on marriage, acquires the domicile of her husband. Her domicile during marriage changes with his, and his domicile, at the dissolution of the marriage by death or divorce, remains hers till she afterwards acquires a new one in the same way as other independent persons. As Stair tersely puts it, "Her abode and domicile followeth his."<sup>7</sup> According to Lord Fraser,<sup>8</sup> the rule of law that the domicile of the husband is also that of the wife, ceases to apply when they are judicially separated, but not when they live apart by mutual consent, or have entered into a voluntary contract of separation. About the latter part of this *dictum* there can be no doubt. Actual residence—residence in point of fact—signifies nothing in the case of a married woman, and cannot, in ordinary circumstances, be set up against the presumption of law that she resides with her husband.<sup>9</sup> A wife cannot have or

<sup>1</sup> *In re Beaumont*, [1893] 3 Ch. 497.

<sup>2</sup> See Guardianship of Infants Act, 1925 (15 & 16 Geo. V. c. 45).

<sup>3</sup> See *Douglas v. Douglas*, 1871, L.R. 12 Eq. 617.

<sup>4</sup> Private International Law, s. 250.

<sup>5</sup> Conflict of Laws, 4th ed., p. 119.

<sup>6</sup> See *Pottinger v. Wightman*, 1817, 3 Mer. 67; *Sharpe v. Crispin*, 1869, L.R. 1 P. & D. 611.

<sup>7</sup> i. 4, 49.

<sup>8</sup> Husband and Wife, ii. 907 and 1254.

<sup>9</sup> *Warrender v. Warrender*, 1835, 2 Cl. & F. 488.

acquire, *stante matrimonio*, a domicile different from her husband's.<sup>1</sup> Until recently it was regarded as an open question whether even a judicial separation would give a wife the power to acquire a domicile for herself,<sup>2</sup> but a recent decision of the Privy Council definitely disapproves of the idea that a judicially separated wife can acquire a domicile for herself.<sup>3</sup> A widow retains her late husband's last domicile until she changes it, and a divorced woman is in this respect in the same position.

#### SECTION 8.—ASCERTAINMENT OF DOMICILE.

**98.** The *criteria* or proofs of domicile are most fully investigated by Phillimore.<sup>4</sup> They are of two classes: (*a*) legal presumptions, and (*b*) the known facts of the case. The ascertainment of domicile starts, first of all, from the person's situation at the moment in question, in regard to which the legal presumption is, that "a person's being in a place is *prima facie* evidence of his being domiciled there, and it lies upon those who say otherwise to rebut this presumption."<sup>5</sup> Thus, a man is *prima facie* domiciled in the place where he is resident at the time of his death. But it may or may not be easy to repel this presumption, as, *e.g.* by shewing that he was there as a traveller, or on a visit, or on some particular business, or for the sake of his health; any of which circumstances may suffice to remove the impression that he was domiciled there at the time. Again, the legal presumption is always against change of domicile, from which it follows that any domicile of a person, once known, is presumed to be retained until the contrary is established, either, in the case of an acquired domicile, by its having been abandoned, or, in the case of a domicile of origin, by proof that a new one has been acquired.

**99.** The facts which are evidence in a question of domicile are of the most miscellaneous description. No circumstance of an individual's life is too insignificant to be taken into consideration, if it is relevant to prove either of the essential elements of domicile, *viz.* the fact of his residence in a particular country, and the *animus* or intention which dictated his movements; <sup>6</sup> *e.g.* in one case where the question was whether a testator had acquired and retained a domicile in Germany, the fact that he had imported a quantity of old Madeira to help him to withstand the climate was considered important as tending to shew

<sup>1</sup> *Low v. Low*, 1891, 19 R. 115, per Lord Trayner at p. 123. Lord Trayner adds (p. 124) that even a judicial separation does not enable the wife to acquire a separate domicile.

<sup>2</sup> Westlake, 7th ed., s. 253; *Dolphin v. Robins*, 1859, 7 H.C.L. 390; *Mackinnon's Trs. v. Inland Revenue*, 1920 S.C. (H.L.) 171; and [1921] A.C. 146 (cit. as *Lord Advocate v. Jaffrey*). The idea of judicial separation affording ground for change of domicile was disapproved by Lords Haldane and Shaw, and left open by Lords Finlay and Dunedin.

<sup>3</sup> *Attorney-General for Alberta v. Cook*, 1926, 42 T.L.R. 317.

<sup>4</sup> Secs. 211-351.

<sup>5</sup> *Bruce v. Bruce*, 1790, 2 B. & P. 229, per Lord Thurlow at p. 231.

<sup>6</sup> See Dicey, *Conflict of Laws*, 4th ed., p. 131, and illustrative cases enumerated therein.

an intention to reside permanently in that country.<sup>1</sup> Among other elements which may be appealed to in case of doubt is the *sedes fortunarum*. Where a man has more than one residence, his domicile may be determined by the fact, *inter alia*, that one rather than another is the centre of his business or financial interests.<sup>2</sup> A person's purpose is more certainly inferred from his acts than from his language; but expressions of intention to reside permanently in a given country are, of course, evidence of that intention, and so far are admissible as evidence of domicile,<sup>3</sup> unless contradicted by his acts.<sup>4</sup>

**100.** Residence in a particular country has a double significance in regard to domicile. It is not only one of the elements which go to constitute it, and is indeed a necessary element in the case of an acquired domicile, but it is also often the most significant evidence of the other element of domicile, viz. the *animus manendi*. Regarded in this latter aspect, its importance depends upon its duration and mode.<sup>5</sup> Actual residence in a given country is, no doubt, *prima facie* evidence of intention to reside there permanently, but the presumption is at once rebutted by everything in the nature of the residence which is inconsistent with such an intention. An uninterrupted residence for thirty-eight years was held by the House of Lords inadequate to prove an English domicile in the case of an American who had throughout that time given clear evidence of an intention to return to the United States; though in that case the length of residence had led the Court of Appeal to a contrary view.<sup>6</sup> On the other hand, it has been held that a Scotsman obtained a domicile of choice in England although in his testamentary writings he was described as a "domiciled Scotsman."<sup>7</sup> It has been said that there is a presumption against Europeans acquiring a domicile by long residence in Oriental countries. Any such presumption, however, is readily overcome by evidence as to fact and intention. It is perfectly easy for Europeans to acquire a domicile in Egypt, China, or Ceylon.<sup>8</sup> Again there are cases of persons whose residence is to be ascribed to some motive other than the mere desire to live in the particular country; where, *e.g.* the residence is dictated by legal necessity, as in the case of prisoners, convicts, or refugees;<sup>9</sup> or official duty, as in the case of ambassadors, consuls, soldiers, and sailors;<sup>10</sup>

<sup>1</sup> *In re Marrett*, 1887, 36 Ch. D. 400, per Cotton L.J.; *Corbidge v. Somerville*, 1914, 51 S.L.R. 406.

<sup>2</sup> See *Brooks v. Brooks's Trs.*, 1902, 4 F., per Lord Pres. at p. 1037; *Ross v. Ross*, 1926 S.C. 1038.

<sup>3</sup> *Hamilton v. Dallas*, 1875, 1 Ch. D. 257.

<sup>4</sup> *Brunel v. Brunel*, 1871, L.R. 12 Eq. 298.

<sup>5</sup> See *Lord Advocate v. Brown's Trs.*, 1907 S.C. 333.

<sup>6</sup> *Winans v. Attorney-General*, [1904] A.C. 287.

<sup>7</sup> *Corbidge v. Somerville*, *supra*.

<sup>8</sup> *Lord Advocate v. Brown's Trs.*, *supra*; *Casdagli v. Casdagli*, [1919] A.C. 145.

<sup>9</sup> *Burton v. Fisher*, 1828, Milward's Reps. 183; *De Bonneval v. De Bonneval*, 1838, 1 Curt. 856; *In Goods of Duchess d'Orleans*, 1859, 1 Sw. & Tr. 253.

<sup>10</sup> *Heath v. Samson*, 1851, 14 Beav. 441; *Attorney-General v. Kent*, 1862, L.J. Ex. 397; *Udny v. Udny*, 1869, 7 M. (H.L.) 89, per Lord Westbury at p. 99; *In re Macreight*, 1885, 30 Ch. D. 165; *Fairbairn v. Neville*, 1897, 25 R. 192.



or by considerations of health or for study as in the case of invalids and students;<sup>1</sup> or under other circumstances, which deprive the residence of a free and voluntary character, as, *e.g.* in the case of servants, lunatics, or persons engaged in some special employment.<sup>2</sup> This class of cases, which are frequently described as instances of what is called a "necessary domicile," is very fully discussed by Dicey,<sup>3</sup> who points out that the term is in strictness appropriate only to a domicile determined not by the free choice of the party, but by the direct operation of some rule of law, as, for example, in the case of a married woman or a minor. The peculiarity of the residence is not so much that it is involuntary, in the sense of being imposed by some external necessity apart from the will of the party, as that the circumstances of it prevent its being regarded as an indication of free choice, and give no ground for inferring from it the intention of permanency, in other words, the *animus* essential to constitute domicile. A "necessary" domicile is, strictly speaking, a contradiction in terms. And, on the other hand, a residence, undertaken for any of the reasons before enumerated, may be or become of "that fixed and permanent sort which excludes the idea of any other domicile remaining, and necessarily induces a new domicile in the country in which it is established."<sup>4</sup>

#### SECTION 9.—DOMICILE OF LEGAL PERSONS OR CORPORATIONS.

**101.** The regulation of any artificial person in matters concerning only itself, or the relations of its members to it and to one another, must depend on the law from which it derives its existence. That law is its personal law, and hence it may be said to be domiciled in the country of that law. The idea of domicile relates to the life of the natural man, and is not therefore, properly speaking, applicable to legal or artificial persons. But it may become necessary to assign also to these something corresponding to the domicile of natural persons, as it were an artificial domicile, especially in order to fix their forum. The analogy of natural persons leads us to assign to a corporation as its domicile the place where its corporate life is manifested, where is the centre of its affairs. This depends, as Savigny<sup>5</sup> explains, upon the natural connection of the legal person with the territory, the locality in which its functions are discharged. And this domicile is, of course, entirely distinct from that of the persons who compose the corporation. It is, moreover, a fiction suggested by the fact that a corporation, like an individual, is subject in certain respects to the law of a particular

<sup>1</sup> *Johnstone v. Beattie*, 1843, 10 Cl. & F., per Lord Campbell at p. 139; *Hoskins v. Matthews*, 1856, 8 De G. M. & G., 13; *Re Garden*, 1895, 11 T.L.R. 167.

<sup>2</sup> *Bempde v. Johnstone*, 1796, 3 Ves. jun. 198; *Urquhart v. Butterfield*, 1887, 37 Ch. D. 357.

<sup>3</sup> *Conflict of Laws*, 4th ed., pp. 137-151.

<sup>4</sup> *Clarke v. Newmarsh*, 1836, 14 S. 488, per Lord Pres. Hope at p. 500; *Lord Advocate v. Brown's Trs.*, 1907 S.C. 333.

<sup>5</sup> Sec. 354.



country. But as the intention of residence, which fixes the domicile of natural persons, cannot be predicated of artificial persons, the ascertainment of the domicile of a corporation resolves itself into the inquiry whether, for certain purposes, it is to be considered as resident in a particular country.

**102.** The residence and domicile of a trading corporation are determined by the situation of its principal place of business, by which is meant the place where its administrative business is carried on,<sup>1</sup> not necessarily the locality of its manufacturing or other business operations. Thus, a company registered in Scotland is domiciled there, although it may have been incorporated to carry on operations in some foreign country. Such a company is liable to pay the income tax, exigible from persons residing in the United Kingdom.<sup>2</sup> In the case of companies registered under the Companies Act, the place of registration is the domicile; and so it has been held that a company whose registered office is in Scotland is "domiciled and ordinarily resident" there in the sense of the rule which regulates service out of the jurisdiction, although it may have subordinate or branch establishments in England.<sup>3</sup> But a corporation may for some purposes have more than one domicile, in the same way and to the same effect as an individual; *e.g.* so as to be subject to the jurisdiction of the Courts of another country than that in which it has its seat.<sup>4</sup> Perhaps the better opinion is, however, that a corporation has one principal domicile at the place where the centre of its affairs is to be found, and that the other places in which it may have subordinate offices or separate functions correspond to the residence of an individual.<sup>5</sup> In the case of corporations, other than trading corporations, the domicile is the place where its functions are discharged. This applies to incorporated towns, hospitals, etc.

#### SECTION 10.—MATRIMONIAL DOMICILE.

**103.** Both in English and Scots law an opinion prevailed for many years that jurisdiction in divorce could not be exclusively rested on domicile in the strict sense, and that redress for conjugal infidelity might be had in the place of residence of the married pair, without inquiring where the husband's domicile of succession might be. (See JURISDICTION.) Jurisdiction for divorce had accordingly been sustained in Scotland in a series of cases, on the ground of the "matrimonial home" or the "domicile of the marriage" being within the territory.

<sup>1</sup> See Lindley, *Company Law*, 6th ed., App. i., pp. 1221–1223; *Daimler Co. v. Continental Tyre Co.*, [1916] 2 A.C. 307.

<sup>2</sup> See decisions as to residence of a Corporation under Income Tax Acts; *Cesena Sulphur Co. v. Nicholson*, 1876, 1 Ex. D. 428; *London Bank of Mexico v. Aphorpe*, [1891] 2 Q.B. 378; *Bradbury v. English Sewing Cotton Co., Ltd.*, [1923] A.C. 744.

<sup>3</sup> *Jones v. Scottish Accident Insurance Co.*, 1886, 17 Q.B.D. 421; *Watkins v. Scottish Imperial Insurance Co.*, 1889, 23 Q.B.D. 285.

<sup>4</sup> *Carron Iron Co. v. Maclaren*, 1855, 5 H.L.C. 416.

<sup>5</sup> Cf. *Saccharin Corporation, Ltd. v. Chemische Fabrik*, [1911] 2 K.B. 516, per Farwell L.J. at pp. 526–527; *In re Hilckes*, [1917] 1 K.B. 48.

The doctrine that for purposes of divorce there may be a matrimonial domicile differing from the absolute domicile which will rule succession, was foreshadowed in *Shields v. Shields*,<sup>1</sup> and was first formulated and applied by the late J.P. Inglis in *Jack v. Jack*,<sup>2</sup> where he stated the true inquiry in such cases to be, "Where is the home or seat of the marriage for the time? where are the spouses actually resident if they be together? or if from any cause they are separate, what is the place in which they are under obligation to come and renew or commence their cohabitation as man and wife?" In England, where the indissolubility of an English marriage by any foreign tribunal was for long an accepted principle, the Courts, in like manner, assumed jurisdiction to dissolve a marriage, even if contracted abroad, on the ground of *bona fide* residence in England. In neither country, however, did the sufficiency of "matrimonial domicile" to give jurisdiction for divorce receive the approval of the Court of last resort. The phraseology in which it was expressed appeared to be figurative, and lacks judicial precision. Neither the Scottish nor English decisions, moreover, gave any indication of the decree of permanence required to constitute matrimonial domicile, or afforded any test by which that degree of permanence might be ascertained. The judgment of the Privy Council in the case of *Le Mesurier v. Le Mesurier*<sup>3</sup> has accordingly authoritatively repudiated the doctrine of "matrimonial domicile" in British law, and established the rule that according to international law "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." The opinion of L. Watson in that case contains a learned discussion of the international law as well as of the municipal laws of both countries on the subject. "Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married persons should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer these laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."<sup>4</sup>

**104.** The Indian Divorce Act<sup>5</sup> was intended to provide parties resident, but not necessarily domiciled in India, with facilities for divorce—i.e. it recognised a "matrimonial domicile" in India. When, however, the rule as to jurisdiction in divorce was based on domicile alone by the judgment in the case of *Le Mesurier* the practice of the Indian Courts should have been brought into harmony. This was not done, and the validity of divorces based on a "matrimonial domicile" in India was not challenged till the case of *Keyes v. Keyes* in 1921.<sup>6</sup> Now the matter is

<sup>1</sup> 1852, 15 D. 142.

<sup>2</sup> 1862, 24 D. 467.

<sup>3</sup> [1895] A.C. 517.

<sup>4</sup> *Le Mesurier v. Le Mesurier*, [1895] A.C., per Lord Watson at p. 540.

<sup>5</sup> 1869 (Act IV. of 1869).

<sup>6</sup> [1921] P. 204.

regulated by The Indian and Colonial Divorce Jurisdiction Act, 1926, which applies to Scotland.<sup>1</sup> This Act provides for jurisdiction in matrimonial disputes of the High Courts in India when parties are domiciled in England or Scotland, provided that (a) the ground of action is one on which decree might be granted by the High Court in England, (b) the rules and principles of the English law are followed, (c) the petitioner resides in India at the time of presenting the petition and the place where parties last resided together was India or, where dissolution of the marriage is sought, either the marriage was solemnised in India or the adultery or crime complained of was committed there; (d) the Court may refuse to entertain a case if the petitioner is not prevented by poverty or official duty from going to the Courts of his permanent domicile.<sup>2</sup>

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<sup>1</sup> 16 & 17 Geo. V. c. 40.

<sup>2</sup> Sec. 1.

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## DOMINANT TENEMENT.

*See* SERVITUDES.

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## DOMINIUM DIRECTUM.

## DOMINIUM UTILE.

*See* CHARTER, FEUDAL; DISPOSITION; SUPERIOR  
AND VASSAL.

# DONATION.

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## SECTION 1.—DEFINITION.

**105.** Donation is the free gift *inter vivos* of any subject by one who is not under an antecedent legal obligation to give it. Acceptance by the donee is not, in a case of pure donation, requisite to complete the donation; nor is knowledge on his part in all cases necessary, for donation may be made by delivery to a third party on behalf of the donee. Where, however, acceptance of the gift involves the undertaking by the donee of some duty or obligation, proof of acceptance is necessary in order to charge the donee with performance.

## SECTION 2.—SUBJECTS OF DONATION.

**106.** Any form of property, heritable or moveable, and any right capable of transmission, may be the subject of donation. Donations of cash may be made by means of a cheque,<sup>1</sup> or a bill,<sup>2</sup> or a deposit receipt.<sup>3</sup> A share in a pawnbroking business,<sup>4</sup> the donee's own IOU,<sup>5</sup> the use of a house,<sup>6</sup> an obligation to pay an annuity after the donor's death,<sup>7</sup> a wife's renunciation of her legal rights,<sup>8</sup> and her acceptance and judicial ratification of a provision in lieu of her legal rights,<sup>9</sup> have all been held matters capable of being donated.

<sup>1</sup> *Milne v. Grant's Exrs.*, 1884, 11 R. 887.

<sup>2</sup> *Durie's Exrs. v. Fielding*, 1893, 20 R. 295.

<sup>3</sup> *Dawson v. M'Kenzie*, 1891, 19 R. 261.

<sup>4</sup> *Lord Advocate v. M'Court*, 1893, 20 R. 488.

<sup>5</sup> *Anderson's Trs. v. Webster*, 1883, 11 R. 35.

<sup>6</sup> *Johnston v. Johnston*, 1904, 6 F. 665.

<sup>7</sup> *Duguid v. Caddall's Trs.*, 1831, 9 S. 844.

<sup>8</sup> *Roughhead v. Hunter*, 1827, 5 S. 266.

<sup>9</sup> *M'Neill v. Steel's Trs.*, 1829, 8 S. 210.



## SECTION 3.—REQUISITES OF DONATION.

107. Donation, to be complete, requires, first, transmission of the subject *habili modo* from the donor to the donee, or to someone on his behalf, and, second, proof or legal presumption of the *animus donandi*.

SUBSECTION (1).—*Delivery*.

108. The transmission must be *habili modo*. In the case of corporeal moveables, actual delivery is sufficient, while in the case of heritable subjects, and other subjects for the transmission of which writing is necessary, delivery of the proper deed or writing must be made. If the donation take the form, not of an immediate transference of the subject, but of an obligation to deliver the subject at some future time, as in the case of a bond of provision, the delivery of the deed of obligation completes the donation.<sup>1</sup> It is essential that the donor should divest himself of the subject by putting it entirely beyond his own control, and should put it in the possession of the donee or of someone on the donee's behalf.<sup>2</sup> Delivery may be inferred, however, even where there has not been actual transference of the subject. Thus it has been held that the expression of an intention to give, followed by an overt act by the donor in pursuance of that intention, may constitute donation, although there has been no actual delivery of the subject of the gift.<sup>3</sup> (See also DELIVERY OF DEEDS.<sup>4</sup>)

SUBSECTION (2).—*Animus donandi*.

109. Delivery must be conjoined with the *animus donandi*. In some cases this is presumed, and the onus of proof is on the party disputing donation; but in the ordinary case the presumption of law is against donation.<sup>5</sup> While the proof of the transmission of the subject must be *habili modo*, the proof of the *animus donandi* which is necessary to overcome the presumption against donation may be parole, and proof on both these points must be complete. Where the transmission is not open to dispute, as in the case of a deposit receipt endorsed and handed over, possession of the document is ascribed *prima facie* to trust or mandate, and a complete proof is necessary of *animus donandi*.<sup>6</sup> On the other hand, even although there be complete proof of the *animus donandi*, it will not make donation unless the transmission be complete.<sup>7</sup>

<sup>1</sup> *Duguid v. Caddell's Trs.*, 1831, 9 S. 844.

<sup>2</sup> *Milne v. Grant's Exrs.*, 1884, 11 R. 887; *Cameron's Trs. v. Cameron*, 1907 S.C. 407.

<sup>3</sup> *Smith v. Smith's Trs.*, 1884, 12 R. 186; *Shaw v. Muir*, 1892, 19 R. 997.

<sup>4</sup> Sol. V. p. 533, *ante*.

<sup>5</sup> *Brownlee's Exrs. v. Brownlee*, 1908 S.C. 232.

<sup>6</sup> *Durie v. Ross*, 1871, 9 M. 969.

<sup>7</sup> *M'Nicol v. M'Dougall*, 1889, 17 R. 25; *Durie's Exrs. v. Fielding*, 1893, 20 R. 295; *Milne*, *supra*; see para. 131, *infra*.

## SECTION 4.—IRREVOCABILITY.

**110.** Where there is complete transmission and *animus donandi* proved or presumed, the donation is complete, and is irrevocable.<sup>1</sup> In this respect the law of Scotland differs from the Roman Law, by which a donation, though perfected by delivery, was revocable for ingratitude on the part of the donee, but only during the lifetime of donor and donee. Being an action *ex delicto*, the claim of revocation did not transmit against the heir of the delinquent, nor did it transmit in favour of the donor's heir, for a presumption of forgiveness was held to arise from the donor's silence during his life. This right of revocation was said by the institutional writers to be also the law of Scotland,<sup>2</sup> but there are no recorded decisions of the Courts giving effect to it, and it is doubtful whether it would now be upheld.<sup>3</sup> In the case of *Duguid*, though the facts disclose a case of ingratitude, the plea was not taken.

**111.** The rule that donations are irrevocable has been to a certain extent qualified by the *beneficium competentiæ*, whereby the granter of a gratuitous obligation, who prior to the performance thereof has become indigent, is relieved from fulfilling his obligation except to the extent of his ability to do so. The benefit is conferred by the law of Scotland on fathers and grandfathers against their children and grandchildren, even although the result should be to reduce the children to indigence; but it is not extended to the case of strangers, or to collateral relations, or even to the case of brother and sister.<sup>4</sup> In the earlier cases this right was not allowed,<sup>5</sup> but later decisions have established its applicability to the limited extent stated.<sup>6</sup> The *conditio si sine liberis decesserit*, by which, if one made a gift of all, or the greater part, of his estate when he had no children, and afterwards came to have children, the gift became void, upon the presumption that if the donor had anticipated having children of his own he would not have made it, has never been applied in Scotland in cases of *inter vivos* donation perfected by delivery, though it has been recognised to some extent in cases of testamentary settlements and donations *mortis causa*. Remuneratory donations fall under the definition given above for pure donations; but they differ in this, that while the donor is under no legal obligation, he is under a moral obligation, to make the gift.

## SECTION 5.—PRESUMPTION AGAINST DONATION.

## SUBSECTION (1).—General.

**112.** "It is a rule in law, *Donatio non presumitur* : and therefore, whatsoever is done, if it can receive any other construction than dona-

<sup>1</sup> *Duguid v. Caddall's Trs.*, 1831, 9 S. 844; *M'Gibbon v. M'Gibbon*, 1852, 14 D. 605.

<sup>2</sup> *Stair*, i. 8, 2; *Ersk. Inst.* iii. 3, 90; *Bankt.* i. 9, 4.

<sup>3</sup> *Bell's Prin.*, s. 64.

<sup>4</sup> *Ersk. Inst.* iii. 3, 89; *Bankt.* i. 9, 8.

<sup>5</sup> *Dick*, 1669, *Mor.* 1389; *Cairnes v. Cairnes*, 1687, *Mor.* 1389.

<sup>6</sup> *Bontein v. Bontein*, 1745, *Mor.* 1390; *Hogg v. Hogg*, 1749, *Mor.* 1390, *rev.* 1 *Pat.* 469; *Hardie v. Hardie*, 1st July 1813, *F.C.*

tion, it is constructed accordingly. Whence ariseth that other rule of law, *Debitor non presumitur donare.*"<sup>1</sup> The ground of the presumption is sufficiently obvious: "No person is presumed to do what, in place of bringing him profit, must certainly be attended with some pecuniary loss."<sup>2</sup> It will be observed that neither of the brocards above mentioned states the presumption correctly. The principle is not merely that there is no presumption in favour of donation, but that there is a presumption against it. Lord Fullerton stated the rule thus: "When we say that donation is not to be presumed, the only practical result is that it must be sufficiently proved; that there must be such a preponderance of evidence in favour of it, as to render any other supposition inadmissible according to the ordinary probabilities of dealing between the parties."<sup>3</sup> And in a later case<sup>4</sup> he observes that "when donation is averred, the burden of proof lies on the party so averring." Where, however, the subject of the alleged gift is held on a title *ex facie* absolute, the *onus probandi* will be upon the person denying donation and alleging trust.<sup>5</sup>

#### SUBSECTION (2).—*Proof of Intention.*

**113.** The course of judicial opinion has not been uniform in regard to the admissibility of parole evidence in rebutting the presumption.<sup>6</sup> It is now settled, however, that such proof is competent whether the gift alleged be *mortis causa* or *inter vivos*<sup>7</sup> in character. In either case two requirements must be satisfied: the transaction must be free from suspicion, and the proof must be satisfactory.<sup>8</sup>

**114.** It is plain, in regard to the first point, that the nature of the relations which subsisted between the parties is an element of great importance. Thus the fact that the person alleging donation kept the alleged donor apart from his friends and relations,<sup>9</sup> or supplied him with excessive quantities of intoxicants,<sup>10</sup> will strengthen the presumption against donation. It is to be observed in this connection, that a donation to a person in a position of dominant or ascendant influence, by one subject to that influence, is regarded as granted in exercise of that influence, and, unless the presumption be overcome, the donation will be set aside.<sup>11</sup> This principle has received illustration in the case of parent and child, client and law agent,<sup>12</sup> spiritual adviser and penitent,<sup>13</sup> and doctor and patient.<sup>14</sup> On the other hand, the presumption against

<sup>1</sup> Stair, i. 8, 2; iv. 45, 17 (14).

<sup>2</sup> Ersk. iii. 9, 32.

<sup>3</sup> *British Linen Co. v. Martin*, 1849, 11 D. 1004, at p. 1008.

<sup>4</sup> *Heron v. M'Geoch*, 1851, 14 D. 25, at p. 30.

<sup>5</sup> *Kirkpatrick v. Bell*, 1864, 2 M. 1396; M'Laren, Wills and Succession, ss. 1918 *et seq.*

<sup>6</sup> Dickson on Evidence, s. 158.

<sup>7</sup> *Morris v. Riddick*, 1867, 5 M. 1036; *Wright's Exrs. v. City of Glasgow Bank*, 1880, 7 R. 527; *Crosbie's Trs. v. Wright*, 1880, 7 R. 823; *Sharp v. Paton*, 1883, 10 R. 1000.

<sup>8</sup> *Crosbie's Trs. and Sharp*, *supra*; cf. *Ross v. Mellis*, 1871, 10 M. 197.

<sup>9</sup> *Sharp*, *supra*.

<sup>10</sup> *Ross*, *supra*.

<sup>11</sup> *Tennent v. Tennent's Trs.*, 1868, 6 M. 840; 8 M. (H.L.) 10.

<sup>12</sup> *Gray v. Binny*, 1879, 7 R. 332.

<sup>13</sup> *Munro v. Strain*, 1874, 1 R. 522.

<sup>14</sup> *Knox v. Crawford*, 1862, 24 D. 1088.



donation is much weaker where a receipt is taken in favour of a near relation or friend, with whom the alleged donor was on intimate and affectionate terms, than where it is taken in name of a clerk or man of business, or executor or trustee. In the second class of cases the inference is that the money is handed over, not as a gift, but for facility in administration, or for the purposes of the will, or for interim custody.<sup>1</sup> Instances of the first<sup>2</sup> and of the second<sup>3</sup> classes of cases are cited below. The fact that the alleged donor had on a previous occasion employed a man of business to draw, and then to alter, his settlement, and that, on the occasion of the alleged gift, the services of such a person were procurable, but were not procured; or that he had made a settlement with which the alleged donation was inconsistent;<sup>4</sup> or that the alleged donation embraced all, or nearly all, his means, is, in general, an element considered to be adverse to the establishment of donation. But the weight and importance to be attributed to such elements may be qualified by consideration of the other facts in the case. For example, the proof may vindicate the *bona fides* of a transaction which, on the face of it, has the appearance of a simulate transfer. Again, it is very improbable that a man will denude himself of all that he has; but the improbability is less striking when the man knows that he is ill of a malady from which he cannot recover.<sup>5</sup>

115. In regard to the second point, it is to be observed that, in order to establish a gift *inter vivos*, the proof must be stronger than where a *donatio mortis causa* is in question; for in the latter case the gift is *sub modo*, while in the former it is an out and out donation.<sup>6</sup> Accordingly, while delivery or its equivalent is essential to a gift *inter vivos*,<sup>7</sup> actual delivery is not always necessary to a donation *mortis causa*.<sup>8</sup> In both cases it is of the first importance that the evidence of those who are called in support of the person alleging donation be unambiguous. For example, it will be of no value if it be consistent with the idea of transference for some purpose other than donation, *e.g.* administration.<sup>9</sup> And its value will be greatly diminished if, as observed in the case last cited, "none of the witnesses adhere to any one form of words used by the deceased; they vary from one another in their accounts, nor do they adhere throughout to one particular form of expression, giving one version in their examination-in-chief, another in cross, and a different one sometimes in re-examination. Only a slight variation would make

<sup>1</sup> *Bryce v. Young's Exrs.*, 1866, 4 M. 312; *Crosbie's Trs. v. Wright*, 1880, 7 R. 823.

<sup>2</sup> *British Linen Co. v. Martin*, 1849, 11 D. 1004; *Lord Advocate v. Galloway*, 1884, 11 R. 541; *M'Cubbin's Exrs. v. Tait*, 1868, 6 M. 310; 40 Sc. Jur. 158.

<sup>3</sup> *Henderson v. M'Culloch*, 1839, 1 D. 927; *Heron v. M'Geoch*, 1851, 14 D. 25; *Lord Advocate v. M'Neill*, 1866, 4 M. (H.L.) 20; *Ross v. Mellis*, 1871, 10 M. 197; *Thomson v. Dunlop*, 1884, 11 R. 453; *Morrison v. Forbes*, 1890, 17 R. 958.

<sup>4</sup> Cf. *Henderson*, *supra*, with *Gibson v. Hutchison*, 1872, 10 M. 923; *M'Nicol v. M'Dougall*, 1889, 17 R. 25; *Milne v. Scott*, 1880, 8 R. 83.

<sup>5</sup> *Lord Advocate v. M'Court*, 1893, 20 R. 488.

<sup>6</sup> *Sharp v. Paton*, 1883, 10 R. 1000, per Lord Deas.

<sup>7</sup> *Crosbie's Trs.*, *Thomson*, *Milne*, *Galloway*, *supra*.

<sup>8</sup> See paras. 131, 132, *infra*.

<sup>9</sup> *Sharp v. Paton*, 1883, 10 R. 1000.



all the difference in the result of the evidence." It is not necessary that the evidence of the person supporting the gift be absolutely uncontradicted as to all the facts of the case, provided that the counter-evidence does not render doubtful the truth of the proof of donation.<sup>1</sup>

### SUBSECTION (3).—*Deposit Receipts.*

**116.** A large number of these questions have arisen in connection with deposit receipts, and while, despite the views suggested by Lord Young in the last cited case and Lord Shand's dissenting opinion in *Connell's Trs.*,<sup>2</sup> it is settled that the terms of these documents cannot, taken by themselves, establish a transference of property or constitute an operative destination,<sup>3</sup> still they are very important as affording indications of intention.<sup>4</sup> Thus, where the question is whether the testimony of the donee is, or is not, sufficiently corroborated, it will be strongly in his favour if his story harmonise not only with the terms of the deposit receipts, but with what may be called their history—if, that is to say, the statements attributed to the alleged donor are consistent with his dealings with his bankers. Two cases are worthy of observation—where the claim to a donation is founded on the fact that the receipt had been taken in the name of the claimant, and where it is founded on the fact that the receipt, being in the name of the alleged donor, has been indorsed to the claimant. In the former case the only question is *quo animo* the receipt was taken in these terms.<sup>5</sup> In the latter case the field of inquiry is necessarily wider, for a deposit receipt is not a negotiable instrument; and the property in the sum which it represents cannot be transferred by mere indorsation and delivery, whether the indorsation be blank or special, and whether the words "or order" be added or not. Indorsation is "an ambiguous act"; its purpose may be to make a donation, or it may be to facilitate administration.<sup>6</sup> Nor will mere delivery, without indorsation, of a deposit receipt by the creditor be sufficient to pass the right of credit. Something in writing equivalent to an assignation or procuratory, in favour of the party to whom the receipt is delivered, seems to be necessary.<sup>7</sup>

### SUBSECTION (4).—*Natural Obligations and Presumed Gifts.*

**117.** Where there exists a relation between the parties to the transaction such as to infer a natural obligation upon one to provide for the

<sup>1</sup> *Macdonald v. Macdonald*, 1889, 16 R. 758.

<sup>2</sup> *Connell's Trs. v. Connell's Trs.*, 1886, 13 R. 1175.

<sup>3</sup> *Watt's Trs.*, 1869, 7 M. 930; *Durie v. Ross*, 1871, 9 M. 969; *Crosbie's Trs. v. Wright*, 1880, 7 R. 823; *Jamieson v. M'Leod*, 1880, 7 R. 1131; *Dinwoodie's Exrx. v. Carruther's Exr.*, 1895, 23 R. 234.

<sup>4</sup> *Crosbie's Trs.*, *supra*, per Lord Pres. Inglis; *Durie*, *supra*; *Macdonald*, *supra*.

<sup>5</sup> *Gibson v. Hutchison*, 1872, 10 M. 923; *Buchanan v. Buchanan*, 1876, 3 R. 556.

<sup>6</sup> *Sharp v. Paton*, 1883, 10 R. 1000, per Lord Shand.

<sup>7</sup> *M'Nicol v. M'Dougall*, 1889, 17 R. 25.

other, as in the case of father and child,<sup>1</sup> or uncle and nephew,<sup>2</sup> there is room for the presumption that advances made have been made *ex pietate*—that they are to be regarded as gifts rather than as debts.<sup>3</sup> As regards the former case, it is to be observed that advances made by a parent to a child are subject to collation, unless the parent has expressly or by clear implication declared his intention to the contrary. Further, this presumption has been held to apply in the case of payments made by a person in good circumstances on behalf of a minor brother during his apprenticeship.<sup>4</sup> In order to determine whether the presumption is or is not applicable, the whole facts and circumstances of the case under consideration must be taken into account. Thus, it has been regarded as an element in the proof that the person making the advances entered, or did not enter, them in his books, or that he received interest upon them, or that, being a man of business habits, he neither mentioned them in making his testamentary dispositions, nor kept any voucher for them in his repositories, or that the advance was not at first regarded as a loan by the person making it, or by the person receiving it, or that the person making it rendered an account in respect of it, or made a demand for payment.<sup>5</sup>

118. "The maintaining at bed and board of one who is come of full age is in law accounted a donation, because it is presumed that he who affords the alimony, if he does not stipulate for himself that he shall have an allowance in name of board, makes him whom he maintains welcome to his house, either for the sake of his company or in consideration of the services he expects from him. But if he earns his bread by the entertainment of strangers, this stronger presumption entitles him to board, even without a previous paction."<sup>6</sup> In several of the cases the person furnishing aliment was not related to him who received it.<sup>7</sup> If the person alimented be a minor, and if his father be alive, or if he have tutors or curators, the sums paid prior to demand cannot be recovered,<sup>8</sup> unless the person alimenting be poor.<sup>9</sup> If his father or his tutors or curators be out of the country,<sup>10</sup> or if he be without tutors and curators, the sums paid will be recoverable, for there was no one with whom the person giving the aliment could contract for repayment.<sup>11</sup> It is otherwise where the facts of the case raise

<sup>1</sup> *Macdougall v. Macdougall*, 1804, Mor. voce "Bankrupt," App. 21; *Nisbet's Trs. v. Nisbet*, 1868, 6 M. 567; *Malcolm v. Campbell*, 1889, 17 R. 255; see also *Fairgrievs v. Hendersons*, 1885, 13 R. 98.

<sup>2</sup> *Wilson v. Paterson*, 1826, 4 S. 817; *Macalister's Trs. v. Macalister*, 1827, 5 S. 219.

<sup>3</sup> *Forbes v. Forbes*, 1869, 8 M. 85, per Lord Cowan.

<sup>4</sup> *Drummond v. Swayne*, 1834, 12 S. 342; cp. *Forbes*, *supra*.

<sup>5</sup> Cp. *Drummond v. Swayne*, 1834, 12 S. 342; *Macalister's Trs. v. Macalister*, *supra*; *Black v. Booth*, 1835, 14 S. 113; *Fraser v. M'Gown*, 1839, 2 D. 144; *Murray v. Murray*, 1843, 6 D. 176; *Farquhar's Trs. v. Stewart*, 1841, 3 D. 658.

<sup>6</sup> Ersk. iii. 3, 92; Stair, i. 8, 2.

<sup>7</sup> *Wilson v. Archibald*, 1701, Mor. 11427; *Norval's case*, cited in *Macalister's Trs.*, *supra*; *Guthrie v. Mackerston*, 1672, Mor. 10137.

<sup>8</sup> *Ludquharn v. Gight*, 1665, Mor. 11425; *Gordon v. Lesly*, 1680, Mor. 11426.

<sup>9</sup> *Wilson v. Archibald*, 1701, Mor. 11427; *Steven v. Simpson*, 1791, Mor. 11458.

<sup>10</sup> Ersk. iii. 3, 92.

<sup>11</sup> Stair, i. 8, 2.

the presumption that the payments were made *ex pietate*.<sup>1</sup> Even then reimbursement may be claimed out of the income of the person alimented, when he has sufficient means of support.<sup>2</sup> If he succeed to such means, he is not rendered liable thereby to repay the alimony received prior to the date of his succession.<sup>3</sup> Where a person maintained his sister-in-law, who was possessed of ample funds, both during her minority and after she attained majority, it was held that, as he was entitled to repayment of what he had expended on her when minor, he was also entitled to the cost of her board after she came of age, although there was no bargain between them.<sup>4</sup> In a very special case,<sup>5</sup> it was held that sums contributed by a sister to her brother's support were a debt against his estate. The fact that the brother and sister belonged to a humble rank of life, that they joined in setting up house, and that the brother regarded himself as his sister's debtor, were the chief considerations upon which the judgment rested.

SUBSECTION (5).—Debitor non presumitur donare.

119. "As a necessary consequence of the presumption against donation, there arises yet a stronger—*Debitor non presumitur donare*; for where a debtor gives money or goods, or grants bond to his creditor, the natural presumption is, that he means to get free from his obligation, and not to make a present, unless donation be expressed."<sup>6</sup> Lord Herschell observes that the maxim "is a maxim which embodies common sense; it is only this, that a debtor is not presumed to make a gift. That is, of course, very far from implying that he may not perfectly well make a gift. I take it to mean this, and this only, that where a debtor makes a disposition of his property in favour of his creditor under circumstances such that a gift would be presumed in the case of a person who was not his creditor, it will not be presumed in the case of a person who is; it will then be regarded as a discharge of his obligation. But if there are circumstances which indicate that he did not intend it to be a mere discharge of his obligation, but intended to benefit the creditor and so make that person an object of his bounty, then it is just as effectual as though no such relationship existed between them. It comes then to be a question of fact to be determined in each case, whether there is enough to shew that he did not intend the disposition to be in satisfaction of his obligation, but did intend it to be a gift."<sup>7</sup> Such facts and circumstances as the following are, accordingly, worthy of consideration: the footing on which the advances were made and taken, the kinship or intimacy of the persons making and receiving them, the history of their past relations, the means of each, the nature of the

<sup>1</sup> See para. 116, *supra*.

<sup>2</sup> Cp. *Guthrie v. Mackerston*, 1672, Mor. 10137, and *Gourlay v. Urquhart*, 1697, Mor. 11438, with *Fairgrievies v. Hendersons*, 1885, 13 R. 98.

<sup>3</sup> *Wilson v. Paterson*, 1826, 4 S. 817.

<sup>4</sup> *Spence v. Fowles*, 1681, Mor. 11437.

<sup>5</sup> *M'Gaws v. Galloway*, 1882, 10 R. 157.

<sup>6</sup> Ersk. iii. 3, 93; Stair, i. 8, 2.

<sup>7</sup> *Johnstone v. Haviland*, 1896, 23 R. (H.L.) 6, at p. 9.



debtor's obligation, the form of the advance, the occasion on which it was made,<sup>1</sup> and, if made by deed, the narrative of the deed; and the fact that the person making the payments entered them in his books, or did not enter them, or did, or did not, preserve vouchers for them.<sup>2</sup> It has been held that where a person, having in his hands funds belonging to another person, whom he is not under any natural obligation to maintain, makes advances to him or on his behalf, those advances may be recovered out of the income.<sup>3</sup> The same principle has been applied where the person receiving the advance was a minor, to whom the person making it stood *in loco parentis*.<sup>4</sup> The special circumstances of the case, however, may lead to an opposite conclusion.<sup>5</sup> In *Fairgrieves*,<sup>6</sup> Lord Pres. Inglis expressed an opinion that a father's obligation to maintain his children was so absolute as to preclude any claim by him for reimbursement.

#### SUBSECTION (6).—*Testamentary Provisions.*

120. It may now be regarded as settled that there is a presumption that testamentary provisions by a parent in favour of a child for whom he has undertaken by an antecedent contract to provide, are to be taken in satisfaction of the contractual provision.<sup>7</sup> In *Johnstone*,<sup>8</sup> the legatee was not a child of the testator. The presumption may be displaced by evidence of contrary intention; but in ascertaining intention, the only materials which may be legitimately referred to are the terms of the deeds containing the provisions.<sup>9</sup> It is a circumstance adverse to the presumption that the provisions are dissimilar,<sup>10</sup> or that the testator describes the second provision as a legacy.<sup>11</sup>

121. The presumption holds also in the case of a bequest by a debtor to his creditor; but it is displaced whenever the facts shew that the intention was not to pay a debt, but to make a gift. In the case last cited, Lord Justice-Clerk Hope observed that no weight was to be attached to the circumstances that the deed conferring the legacy contained a general direction to pay debts (see Lord Moncreiff's opinion in that case), and that trifling differences as to the term of payment were of no great importance. Where the ultimate destination of the legacy is to persons other than those entitled to payment of the debt, there is, in general, no room for the presumption; nor will it apply

<sup>1</sup> *Scott v. Scott*, 1846, 8 D. 791, per Lord Justice-Clerk Hope.

<sup>2</sup> See para. 116, *supra*.

<sup>3</sup> *Gordon v. Maitland*, 1757, Mor. 11453; and see *Howden v. Howden*, 1841, 3 D. 388.

<sup>4</sup> *Winrahame v. Eleis*, 1668, Mor. 11433.

<sup>5</sup> *Galt v. Boyd and Ors.*, 1830, 8 S. 332.

<sup>6</sup> 1885, 13 R. 98.

<sup>7</sup> *Kippen v. Kippen's Trs.*, 1856, 18 D. 1137, affd. 1858, 3 Macq. 203.

<sup>8</sup> 1896, 23 R. (H.L.) 6.

<sup>9</sup> *Ibid.*, per Lord Watson at p. 9.

<sup>10</sup> *Elliot v. Bowhill*, 1873, 11 M. 735; cp. *Cowan v. Dick's Trs.*, 1873, 1 R. 119; *Kippen v. Kippen's Trs.*, 1874, 1 R. 1171, per Lord Justice-Clerk Moncreiff; *Hope Johnstone v. Hope Johnstone*, 1880, 7 R. 766.

<sup>11</sup> *Smith v. Common Agent, R. & S. Auchinblane*, 1841, 3 D. 1109; *Balfour v. Balfour's Trs.*, 1842, 4 D. 1044.



where the legacy is given subject to a condition,<sup>1</sup> or where it is not of the same nature as the debt.<sup>2</sup> Where, under a family arrangement, a brother gave his sister heritable security for payment of a sum of money on their mother's death, and before that event granted a holograph absolute obligation to his sister to convey part of the subjects constituting the security, it was held that the presumption was not sufficient to control the terms of the written obligation. It was observed that the two obligations did not quadrate: that the one did not refer to the other; and that the terms of the one did not naturally connect with the other.<sup>3</sup>

**122.** In the opinion of Lord M'Laren, this presumption has no application to cases where "a settlor or testator, after making a testamentary provision in favour of a child or legatee, makes advances to the same individual in the shape of pecuniary payments during his lifetime; . . . for even in the case of an onerous provision, *e.g.* an obligation undertaken in a marriage contract, the father is not a debtor to the child at the time of making the advance, the obligation being in the case supposed only prestable at his death, and payable out of his free estate."<sup>4</sup> He states, as the result of the authorities, that there is no positive presumption that such advances are designed as a satisfaction of the testamentary provision, but that slight evidence of such an intention on the part of the father will be sufficient to raise a presumption.<sup>5</sup> The presumption against donation applies where the advances are made by a person not standing *in loco parentis* to the person receiving them.<sup>6</sup>

#### SECTION 6.—DONATION INTER VIRUM ET UXOREM.

##### SUBSECTION (1).—*Law Prior to Married Women's Property Act, 1920.*

**123.** The law of Scotland adopted the rule of the later Roman Law, that donations made by one of the spouses to the other are valid if not revoked, but may be revoked at any time by the donor.<sup>7</sup> The Married Women's Property Act, 1881,<sup>8</sup> saved the law as to donations. The doctrine was not applied to mere presents, such as birthday gifts of reasonable value,<sup>9</sup> but it did apply to all transactions by which one spouse was materially enriched at the expense of the other.

##### SUBSECTION (2).—*Married Women's Property Act, 1920.*<sup>10</sup>

**124.** This statute provides (s. 5): "Donations *inter virum et uxorem* shall be irrevocable by the donor: Provided that

"(a) This enactment shall not take effect as regards donations made

<sup>1</sup> *Hunter v. Nicolson*, 1836, 15 S. 159.

<sup>2</sup> *Macdowall v. Gordon*, 1833, 11 S. 952.

<sup>3</sup> *Ritchie v. Ritchie*, 1858, 20 D. 1093.

<sup>4</sup> *Wills and Succession*, s. 1372.

<sup>5</sup> *Ibid.*, s. 1376.

<sup>6</sup> *Buchanan v. Ferrier*, 1822, 1 S. 323 (N.E. 358); *affd.* 1824, 2 Sh. App. 445.

<sup>7</sup> D. 24, i. 32.

<sup>8</sup> 44 & 45 Vict. c. 21, s. 8.

<sup>9</sup> D. 24, i. 31, 8; Fraser, H. and W. ii. 296.

<sup>10</sup> 10 & 11 Geo. V. c. 64.

or granted before the passing of this Act until the expiry of one year from and after that date;

“(b) Any donation completed within a year and a day before the sequestration of the estates of the donor under the Bankruptcy (Scotland) Act, 1913, or any amending statute, shall be revocable at the instance of the creditors of such donor.”

The Act does not apply to provisions made by, or reserved to, either spouse in any antenuptial contract of marriage, whether dated prior or subsequent to the passing of the Act (s. 6). The enactment in s. 5 applies to all estate situated in Scotland, and, by the law of Scotland, heritable as between husband and wife, although the donor of such estate may be domiciled furth of Scotland (s. 7 (2)).

**125.** It is thought that neither the intention nor effect of the Act of 1920 is to confer any special privilege on donations between husband and wife, but to place them upon the same footing and open to the same challenges as other gratuitous gifts. The Act has not as yet been the subject of judicial consideration and decision, but it is apparent that it will, or may, give rise to questions of considerable nicety and difficulty, particularly in cases where, as so often happens, one spouse is given the control and management of the household income and expenditure, and where savings are for convenience invested in the name of one alone. In all such cases the tests to be applied will, it is thought, be the same as those in other cases. (See also *BANKRUPTCY AND INSOLVENCY*.<sup>1</sup>)

## SECTION 7.—DONATION MORTIS CAUSA.

### SUBSECTION 1.—*Definition.*

**126.** By the Roman lawyers three kinds of donation *mortis causa* were distinguished, but the doctrine as known to the law of Scotland, and as explained by Bankton, does not precisely answer to any one of them. “A donation *mortis causa*,” says Bankton,<sup>2</sup> “is a deed whereby one, in contemplation of his death, gives anything to another, or grants a right in his favour, revocable at the granter’s pleasure.” He adds that “the characteristics of these donations are that the giver therein prefers the grantee to his heirs, and prefers himself to both.” It would seem, therefore, that the Scottish doctrine “follows more the general definition of the Institutes,<sup>3</sup> which distinguishes donation *mortis causa* from donation *inter vivos* on the one hand, and legacy on the other.”<sup>4</sup> According to Erskine,<sup>5</sup> this kind of donation was little known in practice; but although the doctrine was not finally settled and defined till the case of *Morris*,<sup>6</sup> it was undoubtedly recognised in several early cases.<sup>7</sup> As defined by Lord Pres. Inglis, donation *mortis causa* is “a conveyance

<sup>1</sup> Vol. II. p. 93, *ante*.

<sup>2</sup> i. 9, 18.

<sup>3</sup> ii. 7, 1.

<sup>4</sup> *Blyth v. Curle*, 1885, 12 R. 674, at p. 680.

<sup>5</sup> *Morris v. Riddick*, 1867, 5 M. 1036.

<sup>6</sup> iii. 3, 91.

<sup>7</sup> *Whiteford v. Ayton*, 1742, Mor. 8072; *Mitchell v. Wright*, 1759, Mor. 8082; *Fyfe v. Kedslie*, 1847, 9 D. 853.

of an immoveable and incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and failing such revocation, then for the grantee on the death of the granter. It is involved, of course, in this definition that if the grantee predecease the granter, the property reverts to the granter, and the qualified right of property which was vested in the grantee is extinguished by his predecease.”<sup>1</sup>

127. Such being the nature of the right, it is clear that it cannot be made effectual during the granter's life against his creditors, although on his death it will receive effect against his heirs and executors; and where there is a deficiency of funds, it will be preferable to legacies upon the executry.<sup>2</sup> It may be added that donations are rather presumed absolute than *mortis causa*, and therefore, though made in contemplation of death, if they are irrevocable they are simple gifts.<sup>3</sup>

#### SUBSECTION (2).—*Subjects of Donation mortis causa.*

128. While it is possible to make a donation *mortis causa* of any subject, heritable or moveable, the cases which have come before the Courts relate in the main to sums of money contained in bank deposit receipts. As a deposit receipt is not an assignable or negotiable instrument, no testamentary effect can be given to such documents.<sup>4</sup> Delivery of a deposit receipt *animo donandi* by the creditor therein, without indorsation, is not effectual as a donation *mortis causa*,<sup>5</sup> nor is indorsation of a deposit receipt and delivery sufficient *per se*, for indorsation and delivery only implies a mandate to the indorsee to draw the money, which mandate falls on the death of the indorser.<sup>6</sup> But a receipt taken originally in the name of the claimant, or of the defunct and claimant jointly, receives more favourable consideration than a receipt in the name of the defunct himself, indorsed.<sup>7</sup>

#### SUBSECTION (3).—*Proof of Donation mortis causa.*

129. In order to set up a case of donation *mortis causa*, proof of three things is necessary: (1) that there was *animus donandi*, (2) that a *de presenti* transference was actually made, and (3) that the gift was made in contemplation of death.

<sup>1</sup> *Morris v. Riddick*, 1867, 5 M. 1036, at p. 1041.

<sup>2</sup> *Bankton*, i. 9, 16, 18; *Crosbie's Trs. v. Wright*, 1880, 7 R. 823; *Scott's Trs. v. Macmillan*, 1905, 8 F. 214.

<sup>3</sup> *Cp. Lord Advocate v. Galloway*, 1884, 11 R. 541.

<sup>4</sup> *Watt's Trs.*, 1869, 7 M. 930; *Miller v. Miller*, 1874, 1 R. 1107; *Jamieson v. M'Leod*, 1880, 7 R. 1131; *Connell's Trs. v. Connell's Trs.*, 1886, 13 R. 1175.

<sup>5</sup> *M'Nicol v. M'Dougall*, 1889, 17 R. 25; contrast *Dawson v. M'Kenzie*, 1891, 19 R. 261.

<sup>6</sup> *Jamieson*, *supra*.

<sup>7</sup> *Anderson's Trs. v. Webster*, 1883, 11 R. 35; *Malcolm v. Campbell*, 1889, 17 R. 255.



(i) *Animus donandi.*

**130.** As it is presumably in accordance with the nature of a donation *mortis causa* that the donor prefers the donee to his heir and executor, and himself to both, in every case the first requisite is to determine with what intention the gift was made. As a matter of experience, this has always been the chief topic of contention in the cases that have come before the Court, the question requiring to be determined being: Was the deposit receipt delivered *animo donandi*, or in trust for administration? In the leading case of *Sharp*<sup>1</sup> the decision was against donation, as the expressions said to have been used by the deceased were not inconsistent with the deposit receipt and its contents having been given to the defender for purposes of administration only. Generally, it may be said that as the presumption of law is against donation, it cannot be held to be established "without a verbal or written declaration on the part of the donor of his intention to make a gift to the person to whom the subject is to be transferred, but this declaration may be made to a third person on behalf of the donee."<sup>2</sup>

(ii) *Delivery.*

**131.** It was formerly thought that delivery, actual or constructive, was absolutely essential to the constitution of a donation *mortis causa*, and expressions of opinion to this effect will be found in *Morris*,<sup>3</sup> in *M'Laren on Wills*,<sup>4</sup> and in *Rose*.<sup>5</sup> It has, however, been definitely decided in a series of cases that, while delivery is a most important piece of evidence, it is not absolutely indispensable to the constitution of a donation.<sup>6</sup> The importance of delivery as a factor in the proof varies with the circumstances of each case. In a gift of a corporeal moveable it might be all-important,<sup>3</sup> while in that of money already lodged in bank in the name of the donee, the practical impossibility of further delivery may render its absence insignificant.<sup>7</sup> The Court will always require clear, unequivocal proof, not merely of the *animus donandi*, but also that it was the donor's intention to make, and that he did make, a *de presenti* transference of the subject,<sup>8</sup> and it was pointed out by Lord Pres. Robertson in *Dawson*,<sup>9</sup> that in every case where donation had been established there had been proved some act or deed on the part of the donor indicative of such a *de presenti* transference. Ignorance on the part of the alleged donee of the fact that a deposit receipt was taken in his name will militate against donation.<sup>5</sup> While,

<sup>1</sup> *Sharp v. Paton*, 1883, 10 R. 1000.

<sup>2</sup> *M'Laren, Wills and Succession*, i. 432; *Morrison v. Forbes*, 1890, 17 R. 958; *Trotter v. Spence*, 1885, 22 S.L.R. 353.

<sup>3</sup> *Morris v. Riddick*, 1867, 5 M. 1036.

<sup>4</sup> i. 432.

<sup>5</sup> *Rose v. Cameron's Exr.*, 1901, 3 F. 337, per Lord Young.

<sup>6</sup> *Gibson v. Hutchison*, 10 M. 923; *Crosbie's Trs. v. Wright*, 1880, 7 R. 823; *Blyth v. Curle*, 1885, 12 R. 674; *Scott's Trs. v. Macmillan*, 1905, 8 F. 214.

<sup>7</sup> *Gibson, supra*.

<sup>8</sup> *Taggart v. Higgins' Exr.*, 1900, 37 S.L.R. 843; 8 S.L.T. 139; *Sharp v. Paton*, 1883, 10 R. 1000.

<sup>9</sup> *Dawson v. M'Kenzie*, 1891, 19 R. at p. 272.



therefore, actual delivery *de manu in manum* is not necessary, there must be divestiture of the donor and investiture of the donee, otherwise the result would be simply a verbal legacy.<sup>1</sup>

132. It was never the view of the Court that delivery must be made actually by the donor to the donee; constructive delivery has always been held sufficient.<sup>2</sup> Thus delivery to a third person on behalf of the donee is effective,<sup>3</sup> but an attempt merely to make a verbal appointment of an executor is ineffectual.<sup>4</sup> Written evidence, however, is not required to establish the fact of delivery. Parole evidence is sufficient. "Whatever is sufficient in law to constitute and prove such a transfer of a deposit receipt, must be sufficient to make the donation effectual;"<sup>5</sup> and the property in moveables being transferable onerously by bare tradition, his Lordship argued that it would be most unjust and against all the principles and analogies of law to hold that the gratuitous transference was ineffectual without writing, simply because the recipient acknowledged that he received the gift under a condition. In all subsequent cases this view of the law has been upheld.<sup>6</sup>

### (iii) *Imminence of Death.*

133. There has been considerable difference of opinion on the Bench in regard to the question whether or not it was essential that a donation *mortis causa* should be made under an immediate apprehension of death. Lord Deas, in *Morris's* case,<sup>7</sup> assumed the affirmative, and distinctly gave it as his opinion that a donation *mortis causa* takes effect only in the event of death occurring from the existing illness, revocation being inferred in case of recovery. The same views were maintained by Lords Young and Craighill in *Milne*,<sup>8</sup> but in the case of *Blyth*,<sup>9</sup> where the question was directly raised, it was answered in the negative. In that case Lord Pres. Inglis, after an exhaustive examination of all the sources of authority in the Roman Law and in the law of Scotland, said: "I cannot find in any of our authorities, with the exception of the *dicta* relied on by the appellants" (*i.e.* of Lord Deas in *Morris*, and Lords Young and Craighill in *Milne's Exr.*), "a recognition of the necessity of a present imminent peril to life as a condition of the right or power to make a donation *mortis causa*." In *Whitefoord's* case<sup>10</sup> the plea of *donatio*

<sup>1</sup> *M'Nicol v. M'Dougall*, 1889, 17 R. 25.

<sup>2</sup> *Gibson*, *supra*; *Crosbie's Trs.*, *supra*; *Thomson's Exr. v. Thomson*, 1882, 9 R. 911; *Young v. Donald's Trs.* (O.H.), 1881, 18 S.L.R. 372; *M'Skimming v. Stenhouse* (O.H.), 1883, 21 S.L.R. 3.

<sup>3</sup> *National Bank of Scotland v. Mackie's Trs.* (O.H.), 1905, 13 S.L.T. 383; *Hutchieson's Exr. v. Shearer*, 1909 S.C. 15.

<sup>4</sup> *Thomson v. Dunlop*, 1884, 11 R. 453.

<sup>5</sup> *Morris v. Riddick*, 1867, 5 M. 1036, per Lord Pres. Inglis.

<sup>6</sup> *Ross v. Mellis*, 1871, 10 M. 197; *Jamieson v. M'Leod*, 1880, 7 R. 1131; *Crosbie's Trs.*, *supra*; *Sharp*, *supra*; *Lord Advocate v. Galloway*, 1884, 11 R. 541; *Blyth v. Curle*, 1885, 12 R. 674; *Connell's Trs. v. Connell's Trs.*, 1886, 13 R. 1175.

<sup>7</sup> *Supra*, at p. 1043.

<sup>9</sup> *Blyth v. Curle*, *supra*.

<sup>8</sup> 1884, 11 R. 887.

<sup>10</sup> 1742, Mor. 8072.

*mortis causa* was sustained, although the donor was apparently in his usual health, under no apprehension of speedy death, and lived for two years after the gift. In *Fyfe's* case,<sup>1</sup> again, the donor survived the gift for nine months, and yet the plea of donation *mortis causa* was upheld. The extremest case of all, however, was that of the *Lord Advocate v. Galloway*,<sup>2</sup> where a donation *mortis causa* was sustained as good though the donor survived the gift for three years. The state, however, of the donor's health, his prospect of life, and, above all, his own feelings and belief in this matter, are relevant and important considerations in such a case, as bearing on the proof of the *animus donandi*, and also as tending to shew whether the gift is meant to be absolute or *sub modo*.<sup>3</sup>

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<sup>1</sup> *Fyfe v. Kedslie*, 1847, 9 D. 853.

<sup>2</sup> 1884, 11 R. 541.

<sup>3</sup> *Blyth v. Curle*, 1885, 12 R. 674, per Lord Pres. Inglis.

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## DOUBLE DISTRESS.

See MULTIPLEPOINDING.

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## DOUBLE RANKING.

See SEQUESTRATION.

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## DOUBLE OF SUMMONS.

See PRACTICE AND PROCEDURE.

# DOUBLE TITLE.

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### SECTION 1.—INTRODUCTION.

**134.** The same lands may be held on more than one title. A proprietor may come to have as many titles as the special circumstances warrant and they may easily have antagonistic elements. In a recent case <sup>1</sup> three distinct titles (each conflicting with the others) were shewn to have been made up to the same estates: (1) a Charter of *Ultimus haeres* from the Crown (11th July 1670) followed by a Decree (14th February 1671) and based on the failure of heirs; (2) a Charter of Recognition (29th November 1670) which assumed there was no estate to inherit, the lands having been forfeited by over alienation by the predecessors; (3) a Charter of Adjudication following upon apprisings (25th May 1672 and 24th May 1676).

**135.** Possession is the great interpreter, and the holder may ascribe his possession to any title he pleases. The fact that he has expressly attributed his possession to one will not preclude him from founding, if necessary, upon another; for possession is available to preserve to him, as against third parties, any right existing in his own person.<sup>2</sup> Upon his death, however, difficulties may arise as to which of the titles that co-existed in him is to regulate the succession to the property where, for example, one title is limited to a certain series of heirs and the other is absolute and unrestricted. Hence prescription as applied to double title becomes of the utmost importance.

**136.** In the past there were many controversies, resulting probably from the application of the long prescriptions, forty years' uninterrupted possession being required on the one hand to render a title indisputable, and on the other forty years' disuse or neglect being required to determine conclusive abandonment. The Conveyancing (Scotland) Act, 1874,<sup>3</sup>

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GENERAL AUTHORITIES.—Ersk. Inst. iii. 7, 6; Bell, Prin., ss. 2019, 2020; Moir, *apud* Ersk. Prin., 17th ed., p. 475; Napier on Prescription, pp. 199-229; Millar on Prescription, pp. 47-60; Rankine on Land-Ownership, 4th ed., p. 64.

<sup>1</sup> *Lauderdale v. Scrymgeour-Wedderburn*, 1908, S.C. 1237.  
<sup>2</sup> *Lord Advocate v. Balfour*, 1860, 23 D. 147, per Lord Deas at p. 155.  
<sup>3</sup> 37 & 38 Vict. c. 94, s. 34.

reduced the positive prescription to twenty years (thirty if a minority intervened), and now the 1924 Act <sup>1</sup> has put both prescriptions as regards title on a twenty years' basis without qualification. This simplifies matters and is bound to minimise materially, if not altogether to preclude, difficulties regarding the effect of double title. As, however, the ancient authorities may still have to be invoked for illustrations, these will be gathered together under the headings (1) Where there is, and (2) Where there is not adversity of interest between the titles. Thereafter some observations will be made (3) upon the co-existence of a superiority and a property title, and (4) upon the co-existence of an absolute and a security title to the same lands.

#### SECTION 2.—ADVERSITY OF INTEREST BETWEEN THE TITLES.

**137.** Where one who is at once heir under an entail and under a fee-simple destination neglects the former, and makes up a title under the latter, his possession thereon for twenty years will extinguish the limited title, and the property will pass either to the person called under the fee-simple destination or to the person called under any new destination made by the proprietor in whose person both titles existed. This rule is illustrated by a long series of cases, the most important of which are noted below.<sup>2</sup> It involves the application both of the positive and negative prescription—that is to say, of both parts of the Act 1617, c. 12, as varied by the Acts of 1874 and 1924. On the one hand, there is possession upon a habile title, which after the lapse of the prescriptive period of twenty years is unassailable by persons claiming under any other title whatsoever. On the other hand, there is the express neglect for forty years or twenty years after 1st January 1930 to make up a title under the limited destination, an omission which might have been remedied at any time during that period, but if it has not been remedied the right to require title to be made up is cut off.<sup>3</sup>

**138.** Three points deserve notice in the decisions on the case under consideration. (1) Here alone is *valentia agendi* on the part of someone possessing an adverse interest necessary to bring the positive prescription into play. Possession upon the limited title will not extinguish the unlimited title, for there is no right conferred on anyone by the latter capable of being enforced.<sup>4</sup> (2) To found a plea of prescription, a feudalised title is absolutely necessary.<sup>5</sup> “Let the father be infeft in fee-

<sup>1</sup> 14 & 15 Geo. V. c. 27, s. 17.

<sup>2</sup> *Innes v. Innes*, 1695, Mor. 11212; *M'Dougal v. M'Dougal*, 1739, Mor. 10947; *Douglas v. Douglas*, 1753, Mor. 10955; *Ayton v. Monnyppenny*, 1756, Mor. 10956; *Duke of Hamilton v. Westenra*, 1827, 6 S. 44; *Hope Vere v. Hope*, 1828, 6 S. 517; *Macdonald v. Lockhart*, 1842, 5 D. 372.

<sup>3</sup> *Cuninghame's Trs. v. Cuninghame*, 1852, 14 D. 1065, per Lord Justice-Clerk Hope at p. 1076; *Ersk. Inst.* iii. 7, 6.

<sup>4</sup> *Lord Reay v. Mackay*, 1823, 2 S. 457; 1825, 1 W. & S. 306.

<sup>5</sup> *Welsh Maxwell v. Welsh Maxwell*, 1808, Mor., voce “Prescription,” App. 8; *Lumsdaine v. Balfour*, 13th June 1811, F.C.



simple, and then suppose that he makes a personal deed of entail to a different series of heirs, fenced with irritant and resolute clauses, his eldest son being the first member of tailzie: in that case, if the eldest son enters into possession without making up a title, he could not found on his father's fee-simple title and his own possession to cut off the personal deed of entail. To do this effectually he must have a title in his own person, or at least there must be a title adverse to or independent of his father's title, to which he can ascribe his possession. . . . If he has an infeftment in fee-simple independent of his father's, and forty years' <sup>1</sup> possession, he has all that the Statute 1617 requires. On the other hand, if he wants that independent title, it will not avail him though he should ascribe his possession by the most unequivocal acts to his fee-simple infeftment, in contradistinction to the personal deed of entail. . . . The personal deed which qualifies his father's title is the *lex feudi*, until prescription has run on a different title from that infeftment." <sup>2</sup> (3) The right claimed to be established by possession must be consistent with and not contradictory of the title to which that possession is attributed.<sup>3</sup>

### SECTION 3.—NO ADVERSITY OF INTEREST BETWEEN THE TITLES.

**139.** Where one who is heir under the last investiture and has at the same time a personal title to the lands makes up his title under the old investiture, both titles being unlimited, the personal title continues to qualify the proprietor's right and to regulate the succession, no matter for how long possession may have taken place on the other.<sup>4</sup> The principle involved is that there is no vested right in anyone to call upon the possessor to make up a title under the personal disposition, whereas under an entail a right does exist in the heirs called to the succession to enforce the limitations contained in the deed. On the other hand, where, in circumstances similar to those just figured, a person after making up titles under the old investiture proceeds to execute a new conveyance of the lands containing a destination different from that in the personal title, the personal title will be extinguished, and the destination in the new conveyance will thenceforth be the *lex feudi*.<sup>5</sup> The mere fact that a possessor has served himself heir to the person last vested in the fee instead of completing a title under the personal disposition, will not of itself imply an alteration in the destination, though the resignation of the lands into the hands of the superior and the taking of a new charter with

<sup>1</sup> Now twenty years; 14 & 15 Geo. V. c. 27, s. 17.

<sup>2</sup> *Maule v. Maule*, 1829, 7 S. 527 and Appx. 41, per Lord Corehouse.

<sup>3</sup> *Dalyell v. Dalyell*, 17th January 1810, F.C.; *Cunninghame's Trs. v. Cunninghame*, 1852, 14 D. 1065; *Porterfield v. Stewart*, 1821, 1 S. 6; 1829, 8 S. 16; 1831, 5 W. & S. 515.

<sup>4</sup> *Smith & Bogle v. Gray*, 1752, Mor. 10803; *Durham v. Durham*, 1802, Mor. 11220; affd. 1811, 5 Pat. 482; *Snodgrass v. Buchanan*, 16th December 1806, F.C.; *Zuille v. Morison*, 4th March 1813, F.C.; *Ogilvy v. Watt*, 1837, 15 S. 1027; *Hay v. Paterson*, 1910 S.C. 509, where *Gray's* case is distinguished.

<sup>5</sup> *Edgar v. Johnston*, 1736, Mor. 3089, 2 Ross's L.C. 596 (*Elsieshiells* case); *Harrie v. Craig Buchanan*, 12th December 1811, F.C.; *Molle v. Riddell*, 13th December 1811, F.C.; affd. 1816, 6 Pat. 160.

a different destination will effectually wipe out that in the personal disposition.<sup>1</sup>

**140.** Possession being an indispensable element of prescription, it is important to be able to determine to which of two titles existing in the same person possession is to be ascribed. Where this is doubtful and no choice has been unmistakably indicated, and if one title be more beneficial than another, possession is to be ascribed to the more beneficial (*i.e.* the less limited) title.<sup>2</sup>

#### SECTION 4.—A SUPERIORITY AND A PROPERTY TITLE CO-EXISTENT.

**141.** A certain prestige enures to a superiority title and this has been repeatedly emphasised. In a case where superiors had granted renewals of investiture by charter which had included a piece of ground, possession of which they had retained, their title thereto was preferred to the vassal's successors who held the charter but had no possession, Lord Cringletie raising and answering the question thus: "Can a superior prescribe against a vassal in a subject previously granted to him? I have no doubt he can. If the vassal does not possess, it is an abandonment of the feu. Prescription is not interrupted by renewals of the grant."<sup>3</sup> Another anomalous case arose between two superiors. A superiority was conveyed by one to another but was retained in the former's titles and he continued to grant entries to the vassal in the lands. This was regarded as active possession of the superiority sufficient to oust his own disponee therein as he had never exercised his rights.<sup>4</sup>

**142.** Those cases, however, although involving rival titles to the same subjects hardly exhibit this further aspect of double title in its pure form. This is best seen where the holder of a superiority title to a subject continues to possess the property itself under it for the prescriptive period. In such circumstances he will be held to have acquired as effective a title thereto as if a disposition *ad rem*. had been granted in his favour by the vassal, or as if he had recorded the statutory Minute of Consolidation, the superiority title being *ex facie* sufficient to carry the property and the possession interpreting the extent of the right. But entail titles have given rise to some peculiar questions in the past. Thus where a superior held both the superiority and property of a certain subject—the property title remaining unfeudalised—and then executed an entail of his whole estate, and the succeeding heirs completed their title and had forty years' possession, it was held incompetent for the heir in possession to make up a title to the subjects whose title remained unfeudalised, the possession under the entail or limited title having extinguished that unfeudalised title.<sup>5</sup> Where, however, the title to the

<sup>1</sup> *Molle v. Riddell*, 13th December 1811, F.C.; *affd.* 19th June 1816, 6 Pat. 160.

<sup>2</sup> *Earl of Glasgow v. Boyle*, 1887, 14 R. 419.

<sup>3</sup> *Aytoun v. Mags. of Kirkcaldy*, 1833, 11 S. 676.

<sup>4</sup> *Fergusson v. Gracie*, 1832, 3 Ross's L.C. 370.

<sup>5</sup> *Lord Elbank v. Campbell*, 1833, 12 S. 74; *Bontine v. Graham*, 1837, 15 S. 711; 1840, 1 Rob. App. 347.

property had been feudalised and an entail followed, and a dispute arose between the heir in possession and the other heirs as to his rights in that particular property, his right was sustained against theirs, as he was possessing under two perfectly good titles, to either of which he could ascribe his possession.<sup>1</sup>

#### SECTION 5.—AN ABSOLUTE AND A SECURITY TITLE CO-EXISTENT.

**143.** This is of very common occurrence in practice. The procedure for the sale of property contained in a heritable security has always required rather meticulous care. If all the prescribed steps are strictly carried out, the title granted by the creditor is statutory and therefore of the highest class. But there are sometimes posterior incumbrances to be got rid of as well as possible faults in procedure. The Titles to Land Consolidation (Scotland) Act of 1868 provided that upon consignation of any surplus the disposition to the purchaser was to have the effect of "completely disencumbering the lands and others sold of all securities and diligences posterior to the security of such creditor as well as of the security and diligence of such creditor himself."<sup>2</sup> This was improved upon by the Conveyancing Act of 1874 which provided for the execution and recording of a notarial certificate where there was no surplus. This along with the recorded disposition was declared to have the effect of "completely disencumbering the lands and others sold of all securities and diligences prior and posterior to the security of such creditor as well as of the security and diligence of such creditor himself, save and except when the security and diligence of such creditor shall be assigned by way of further or collateral security to the purchaser."<sup>3</sup> After 1874 it accordingly became customary to take advantage of this provision and incorporate in the disposition an assignation of the bond under which the property had been sold, to be held by the purchaser by way of collateral security in fortification of his title. This assignation also was in use to be assigned to subsequent purchasers, and accordingly if any serious objection were raised against the title by the original debtor in the bond or his representatives, recourse could thereby be had to the bond itself. This collateral title gave an additional feeling of security to the purchaser and the benefit has been continued by the Conveyancing Act of 1924.<sup>4</sup>

**144.** Although those provisions for fortification are primarily made with respect to a sale under bond powers, there is nothing incompetent in taking an assignation of an existing bond in the case of an ordinary sale, if it be thought that the disposition obtainable is liable to question on any ground which the bond would cure. In any case, when the twenty years' prescription has run upon the disposition the assignation of the bond need not, of course, be further continued.

<sup>1</sup> *Earl of Glasgow v. Boyle*, 1887, 14 R. 419.

<sup>3</sup> S. 48.

<sup>2</sup> S. 123.

<sup>4</sup> S. 42.

## DOVECOT.

*See* ANIMALS.

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## DRAFT.

*See* BANKING; WILL.



# DRAINS AND SEWERS.

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### SECTION 1.—VESTING IN LOCAL AUTHORITY.

**145.** The general legislative code regarding drains and sewers is contained in the Public Health (Scotland) Act, 1897,<sup>1</sup> ss. 101 to 123, and also in the statutes afterwards referred to. Under s. 101 of the Act of 1897 all sewers existing within a district and not being private property, or not being and continuing under the management of persons appointed by the Crown, or by or in pursuance of any Act of Parliament or Provisional Order, are vested in the local authority, without prejudice to the rights of any person or persons to the property or management of any sewers in virtue of any local or general police statute. By s. 102 power is conferred upon the local authority to acquire the rights and powers vested in any person to make or use sewers. Sec. 101, in so far as it applies to burghs to which the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act, 1901,<sup>2</sup> is applicable from its commencement, is repealed by that Act. By s. 103 the local authority is empowered to construct within the district and, when necessary for the purpose of outfall, without the district, such sewers as it may think necessary for keeping its district properly cleansed and drained.

### SECTION 2.—SPECIAL DRAINAGE DISTRICTS.

**146.** By s. 122 of the 1897 Act upon requisition to that effect made in writing by a parish council or by not fewer than ten ratepayers within the district of a local authority, not being the local authority of a burgh, the local authority shall be bound to meet after twenty-one days' notice, or if the local authority itself so resolve, it may meet after twenty-one days' notice, and shall, whether sewers or drains have been already constructed or not, consider the propriety of—

- (a) Forming part of its district into a special drainage district;
- (b) Enlarging or limiting the boundaries of a special drainage district; or

<sup>1</sup> 60 & 61 Vict. c. 38.

<sup>2</sup> 1 Edw. VII. c. 24.

- (c) Combining a special drainage district with another special drainage district; or
- (d) Enlarging or limiting the boundaries of both or either of such special drainage districts, and combining the same or parts thereof; or
- (e) Determining that any special drainage district shall cease to exist as a special drainage district, or that any such combination shall cease.

The local authority may resolve accordingly, and provision is made in s. 122 for an appeal to the Sheriff against such a resolution by a person interested. The Sheriff may either approve or disapprove of the resolution, or he may enlarge or limit the special district as defined by the resolution of the local authority.

### SECTION 3.—BURGHs.

**147.** The Burgh Police (Scotland) Act, 1892,<sup>1</sup> ss. 215 to 256, deals with drains and sewers and the formation of drainage districts in burghs. Under s. 215 all sewers and drains within the burgh are vested in the commissioners appointed for the purposes of the Act, and under s. 218 the commissioners are directed to form the whole burgh into one drainage district, subject to certain exceptions and provisions. Under s. 219 the Commissioners are directed to cause to be made such main and other sewers as are necessary for the effective draining of the burgh. Secs. 238 to 245 deal with drainage in houses. The statute applies to all existing burghs with the exception of five burghs named in Schedule 2 of the Act.

**148.** In the case of *Scott v. Magistrates of Dunoon*<sup>2</sup> a local authority in a burgh, proceeding under the Public Health (Scotland) Act, 1867, in 1875 laid down a drain for carrying public sewage through land belonging to B. In 1908 a singular successor of B. sought to interdict the burgh from using the drain, on the ground that the statutory formalities required by s. 73 of the Act of 1867 were not complied with when the drain was laid. The Lord Justice-Clerk (Lord Kingsburgh) expressed the opinion that under s. 215 of the 1892 Act, the drain vested in and passed under the control of the defenders at the date of the passing of the Act, and that it was accordingly immaterial whether the statutory formalities had or had not been complied with.<sup>3</sup>

**149.** In the Public Health Act, 1875,<sup>4</sup> a "drain" is defined as "any drain of and used for the drainage of one building only, or premises within the same curtilage and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or

<sup>1</sup> 55 & 56 Vict. c. 55.

<sup>2</sup> 1909 S.C. 1093.

<sup>3</sup> *Ibid.*, per Lord Justice-Clerk at p. 1099. See also *Glasgow, Yoker, and Clydebank Rly. Co. v. Macindoe*, 1896, 24 R. 160.

<sup>4</sup> 38 & 39 Vict. c. 55, s. 4.

with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." A "sewer" is defined as including sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under the 1875 Act. A natural watercourse may be a sewer.<sup>1</sup> A burn which passes through a burgh, and which is to some extent polluted by sewage from properties outside the burgh, but which is not entered by any sewage from inside the burgh, is not a "sewer" in the sense of s. 215 of the Burgh Police (Scotland) Act, 1892.<sup>2</sup> In the *Glasgow, Yoker, and Clydebank Railway* case the question was raised but not decided, whether s. 215 of the 1892 Act applies only to sewers and drains which are *opera manufacta*.

**150.** By the operation of the Town Councils (Scotland) Act, 1900,<sup>3</sup> s. 8, in any burgh the whole rights, powers, and authorities of—

- (a) Commissioners under the Burgh Police (Scotland) Act, 1892, and
- (b) The Burgh Local Authority under the Public Health (Scotland) Act, 1897,

are transferred to the town councils.

By the Burgh Sewerage, etc., Act, 1901,<sup>4</sup> s. 5, it is provided that the powers and duties of the town council of any burgh, as the authority under the Burgh Police (Scotland) Act, 1892, with reference to sewage and drainage, shall extend to the whole area of the burgh as existing for the purposes of the Public Health (Scotland) Act, 1897; and the town council of any burgh, as the authority under the 1892 Act, has, in addition to the powers conferred upon it by the 1892 Act or any other Act, the same rights, powers, and privileges with reference to sewage and drainage within such area as are conferred by the 1897 Act upon local authorities under that Act in districts other than burghs, with the exception of the rights, powers, and privileges conferred by ss. 122 and 131 of the 1897 Act, and the 1897 Act and the Acts incorporated therewith are, subject to the necessary modifications, incorporated with the Act of 1892.

**151.** For the other statutory provisions as to drains and sewers and special drainage districts, see—

- (1) The Local Government (Scotland) Act, 1889,<sup>5</sup> ss. 77 to 82 (as to division of counties into districts for public health purposes);
- (2) The Alkali, etc., Works Regulation Act, 1881,<sup>6</sup> ss. 5 and 29

<sup>1</sup> *Mags. of Portobello v. Mags. of Edinburgh*, 1882, 10 R. 130.

<sup>2</sup> *Lanarkshire County Council v. Airdrie Mags.*, 1910, 47 S.L.R. (H.L.) 508, and 1910, 1 S.L.T. 351; *Glasgow, Yoker, and Clydebank Rly. Co. v. Macindoe*, 1896, 24 R. 160, and English authorities therein cited.

<sup>3</sup> 63 & 64 Vict. c. 49.

<sup>4</sup> 1 Edw. VII. c. 24.

<sup>5</sup> 52 & 53 Vict. c. 50.

<sup>6</sup> 44 & 45 Vict. c. 37.



(dealing with the provision of channels for carrying off acid from works); and

(3) The Rivers Pollution Prevention Acts.<sup>1</sup>

SECTION 4.—DUTY OF LOCAL AUTHORITY TO PROVIDE DRAINS AND SEWERS.

**152.** A local authority is bound to carry out a proper system of drainage.<sup>2</sup> Where a local authority under the Public Health Act, 1867 (which was repealed by the Act of 1897), had resolved to carry out a scheme of drainage, and where certain feuars petitioned the Sheriff for interdict on the ground that the proposed plan of drainage would cause a nuisance and injuriously affect their property, it was held that as the application was really an attempt to bring the resolution of the local authority under review of the Sheriff it had been rightly dismissed by the latter.<sup>3</sup> It was, however, observed in that case that if a nuisance is actually created by the operations of a local authority, those affected by it have an interest and a right to complain. In another case<sup>4</sup> it was held that, under the Glasgow Police Act, 1866,<sup>5</sup> and the Public Health Acts, 1876 and 1897, the Corporation of Glasgow had a statutory duty to provide and maintain sewers which could effectively deal with all sewage lawfully discharged into such sewers, and that being in breach of that duty by their failure to provide sewers of sufficient capacity, or to take measures to prevent regurgitation, they were liable in damages to the owners of the tenement in question. In that case the opinion was expressed by Lord Salvesen that there might also be ground for holding the defenders responsible for negligence at common law.

**153.** In the case of *Hanley v. Magistrates of Edinburgh*<sup>6</sup> the facts were that on two occasions after heavy rainfalls a market garden, which was bounded by a burn, was flooded, owing to a culvert, which carried the burn under a road, being of insufficient capacity to admit the free passage of the water, which in consequence overflowed into the road, and found its way thence into the garden. In an action of damages at the instance of the tenant of the market garden against the magistrates, it was held that s. 28 of the Edinburgh Corporation Act, 1900,<sup>7</sup> which, *inter alia*, made it unlawful for the Corporation to diminish the supply of sewage water flowing through the burn or to deepen or otherwise interfere with the burn, did not affect the obligation on the defenders at common law and under s. 179 of the Edinburgh and Municipal Police Act, 1879,<sup>8</sup> to make and keep the drainage system

<sup>1</sup> 39 & 40 Vict. c. 75; and 56 & 57 Vict. c. 31.

<sup>2</sup> *Board of Supervision v. Local Authority of Lochmaben*, 1893, 20 R. 434.

<sup>3</sup> *Steel v. Commrs. of Police of Gourock*, 1872, 10 M. 954.

<sup>4</sup> *St. George Co-operative Society v. Corporation of Glasgow*, 1921 S.C. 872.

<sup>5</sup> 29 & 30 Vict. c. 273.

<sup>6</sup> 1913 S.C. (H.L.) 27; [1913] A.C. 488.

<sup>7</sup> 63 & 64 Vict. c. 133.

<sup>8</sup> 42 & 43 Vict. c. 132.



of the burgh effective, and that accordingly they were liable in damages.

**154.** In the important case of *Brownlie & Son v. Magistrates of Barrhead*<sup>1</sup> the local authority of a burgh had adopted a dual system of drainage whereby sewage and roof water was carried by the sewers, and surface water by separate lines of pipes. The surface water from certain premises in the burgh was, with the authority's acquiescence, discharged partly into one of the public sewers. Owing to heavy rainfall the sewers became surcharged, with the result that an accumulation of water, due in part to surface water which the sewer was unable to carry off and in part to an actual overflow from the sewer, collected in the courtyards at these premises, and the floods so formed, augmented later by water from an adjacent stream which overflowed its banks, penetrated the premises and flooded them to a considerable depth. In an action of damages by the owners of the premises against the burgh authority it was held (1) that as the defenders were under a statutory duty to provide for the effectual draining of the burgh they were bound, notwithstanding their adoption of the dual system of drainage, to carry off the surface water from the pursuers' premises by means of their sewer, (2) that the defenders were accordingly responsible for the flooding caused by the surcharging of the sewers, and (3) that they were liable for such damage to the pursuers' premises as could be attributed to this cause, but not for that attributable to the overflow from the stream, which arose from natural causes over which the defenders had no control.

**155.** Notwithstanding the provisions of the Burgh Sewerage, etc., Act, 1901, it is competent for the town council of a burgh, as sewage authority of the burgh—

- (1) To carry out drainage operations in the burgh under the powers conferred by s. 103 of the Public Health Act, 1897; and
- (2) To do so without following the procedure or being subject to the conditions imposed by the Burgh Police Act, 1892.<sup>2</sup>

In the *Haddington* case a burgh sewage authority laid two sewage pipes on and above the *solum* of the bed of a river in the burgh without giving reasonable notice, in the sense of s. 103 of the Public Health Act, 1897, to a proprietor of lands on the bank of the river, who was owner of the river-bed at least *ad medium filum* with a right of common interest in the whole *alveus*. It was held that the proprietor was not entitled to have the sewage pipes removed and the river-bed restored to the condition in which it existed prior to the operations, in respect that, if the pipes were removed as demanded, he could not prevent the local authority, if they thereafter gave reasonable notice, from replacing the pipes in the same position.<sup>3</sup> In a case where application was made for warrant to enter private ground under s. 109 of the Act of

<sup>1</sup> 1925 S.C. (H.L.) 41.

<sup>2</sup> *Montgomerie & Co. v. Haddington Mags.*, 1908 S.C. 127; *affd.* 1908 S.C. (H.L.) 6.

<sup>3</sup> See also the case of *Scott v. Mags. of Dunoon*, 1909 S.C. 1093.

1897, the local authority lodged in process an undated report by the burgh surveyor which bore that the intended course of the sewer "seems the best and most practical way of taking it," and that "to carry out this plan it is necessary that the sewer be carried through the above close." The owners of the ground presented a note of suspension and interdict on the grounds (1) that sufficient notice had not been given, and (2) that there was no surveyor's report to the effect that the sewer was necessary. The Court refused the note.<sup>1</sup> Lord M'Laren expressed the opinion that in a suitable case the Sheriff has power under s. 109 of the 1897 Act to allow a proof, or, if dissatisfied with the report of the surveyor produced, to remit to a neutral surveyor. Lord Adam expressed the opinion that the Sheriff may inquire whether the necessary provisions have been complied with, but that it is not his duty to inquire whether the sewer is necessary or whether it might be made to follow some other course. The Lord President (Lord Dunedin) reserved his opinion. In the same case it was held that the procedure prescribed by the Public Health Act, 1897, for a local authority in the making of sewers is a code which is complete in itself, and that the local authority is entitled to exercise the powers given by the Act for the making of sewers in conformity therewith, without regard to the procedure prescribed by the Burgh Police Act, 1892. In the case referred to the powers and duties of local authorities under the 1897 Act, and the relationship of that Act to the Act of 1892, were elaborately discussed.

**156.** S. 144 of the Act of 1897 empowers a local authority for any of the purposes of certain parts of the Act, including s. 103, "in terms of the Lands Clauses Acts and whether by agreement or otherwise to purchase any lands within or without their district." S. 164 enacts that "full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of this Act except when otherwise specially provided." S. 144 does not imply any obligation upon the local authority to purchase lands occupied for the purposes indicated, and accordingly they are entitled under s. 103 to carry a sewer under a railway upon paying compensation under s. 164.<sup>2</sup> In the *Caledonian Rly. Co.* case it was observed that the same rule would apply wherever a power is conferred by the Act, and it is not made a condition of the exercise of that power that the lands occupied shall be purchased by the local authority.

#### SECTION 5.—CLEANSING OF DRAINS.

**157.** The only enactment which imposes upon a town council of a burgh an express duty to cleanse drains is s. 103 of the Act of 1897,

<sup>1</sup> *Brown v. Mags. of Kirkcudbright*, 1905, 8 F. 77.

<sup>2</sup> *Caledonian Rly. Co. v. Perth District Committee*, 1901, 3 F. 1029; see also *Smeaton v. Police Commrs. of St. Andrews*, 1871, 9 M. (H.L.) 24.

and an action which is based upon an alleged failure to discharge such a duty must be brought within the period of two months laid down in s. 166 of the last-mentioned Act, otherwise the action is excluded.<sup>1</sup> In the case cited the Lord Justice-Clerk (Lord Alness) said: "It appears to me that statute must be the sole measure of both the rights and duties of the defenders with reference to the drains within their jurisdiction as a local authority. Apart from statute, I do not think that they had a right or duty to meddle with these drains."

#### SECTION 6.—EXPENSES OF DRAINS AND SEWERS.

**158.** In a case<sup>2</sup> which raised questions as to the construction of certain sections of the Glasgow Police Act, 1866,<sup>3</sup> it was held by a majority of seven judges, affirming the judgment of Lord Pearson, (1) that when a sewer had been constructed in a road, and the whole expense ascertained and allocated among the proprietors of the adjoining ground in proportion to the respective frontages, the sums so allocated became due by the proprietors although payment was not exigible until a building had been erected on "a land or heritage adjoining the road," and (2) that the existence, twenty-five yards from the road, of a farm house, which had been erected on a farm adjoining the road many years before the Act was passed, satisfied this condition and made the proportion of the cost effeiring to the proprietor for the whole frontage of his lands at once exigible. The question was raised and opinions were expressed *per* and *contra* whether, when a building had been erected on one property, the cost of the sewers became exigible from the whole of the proprietors liable.

**159.** In another case in which a bank holding a title to a piece of building ground *ex facie* absolute, but in reality only in security, feued a portion thereof, taking the vassal bound to pay half the cost of maintaining the portion of the street sewer opposite his feu (which had been constructed by the bank at the real owner's expense), it was held that the owner to whom the lands, so far as not feued, were afterwards reconveyed, had no claim against the feuars for any part of the cost of the original construction of the sewer.<sup>4</sup>

#### SECTION 7.—DISCHARGE OF SEWAGE.

**160.** There is no right at common law to discharge sewage on to the foreshore or into the sea so as to cause injury to private rights, and s. 135 of the 1892 Act does not authorise any such discharge.<sup>5</sup> The

<sup>1</sup> *Brash v. Mags. of Peebles*, 1926 S.C. 995.

<sup>2</sup> *Corporation of Glasgow v. Carter Campbell*, 1901, 3 F. 598.

<sup>3</sup> 29 & 30 Vict. c. 273.

<sup>4</sup> *Stewart v. Meikle*, 1874, 1 R. 408.

<sup>5</sup> *Duke of Richmond v. Mags. of Lossiemouth (O.H.)*, 1904, 12 S.L.T. 166.



undernoted cases deal with the subjects of river pollution by sewage,<sup>1</sup> and nuisance arising from sewage.<sup>2</sup>

## SECTION 8.—DRAINAGE.

### SUBSECTION (1).—*Common Law Rule.*

**161.** Inferior ground must receive the natural drainage of the upper ground, but is not bound to submit to what is produced by artificial changes in the condition of the water.<sup>3</sup> Inferior ground must receive the superfluous water of superior ground, even under the operations of draining in all the variations of agricultural improvement, "subject to equitable regulation by the Court if the superior owner should unduly press his right to the injury of the lower."<sup>4</sup> An inferior proprietor is not entitled by artificial means to throw back the drainage on the superior proprietor, and the superior landowner is equally precluded from bringing upon the land, which naturally drains towards his neighbour's estate, water which would not without artificial means be there at all.<sup>5</sup> A superior owner must not, by the employment of unusual means, so dislocate the natural strata as to throw an excessive quantity of water upon a lower heritor.<sup>6</sup> The general rule as to drainage from superior to inferior ground applies to mines.<sup>7</sup> A proprietor of the inferior lands is entitled to protect himself against the drainage of the superior lands.<sup>8</sup> Drainage may be sent into natural streams and rivers, but it must be sent in the manner least injurious or inconvenient to the other proprietors;<sup>9</sup> and it may not be sent into an artificial mill lead.<sup>10</sup>

### SUBSECTION (2).—*Statutory Provisions.*

**162.** The statute 10 & 11 Vict. c. 113, provides that where any land shall be capable of being drained, or improved by drainage, by means of works to be executed on the same and other lands for obtaining or improving the outfall or otherwise, it shall be lawful for any person interested in the lands so capable of being drained or improved, and

<sup>1</sup> *Guthrie, Craig & Co. v. Mags. of Brechin*, 1885, 12 R. 469; 1888, 15 R. 385; *Cowie & Son v. Commrs. of Dufftown*, 1900, 3 F. 257.

<sup>2</sup> *Barony Parochial Board v. Cadder Parochial Board*, 1883, 10 R. 510; *Police Commrs. of Govan v. M'Kinnon*, 1885, 22 S.L.R. 843; *Smith v. Cameron*, 1900, 37 S.L.R. 900.

<sup>3</sup> Bell's Prin., s. 968.

<sup>4</sup> *Campbell v. Bryson*, 1864, 3 M. 254, per Lord Justice-Clerk Inglis at pp. 259 and 260; *Ersk. ii.* 9, 2; *Bankton, ii.* vii. 30; *Rankine on Land-Ownership*, 4th ed., p. 514.

<sup>5</sup> *Campbell v. Bryson*, *supra*, per Lord Cowan at pp. 261 and 262; and *Rankine on Land-Ownership*, 4th ed., p. 515.

<sup>6</sup> *Durham v. Hood*, 1871, 9 M. 474.

<sup>7</sup> *Aitken*, 1734, Elch. "Property," 1; 2 Bell's Ill., p. 119.

<sup>8</sup> *Durham*, *supra*; *Baird v. Monkland Iron & Steel Co.*, 1862, 24 D. 1418.

<sup>9</sup> *Downie v. Earl of Moray*, 1825, 4 S. 167; 2 Bell's Ill., p. 120; but see *Montgomerie v. Buchanan's Trs.*, 1853, 15 D. 853; *Campbell v. Bryson*, *supra*.

<sup>10</sup> *Eyre v. Earl of Moray*, 1827, 5 S. 912.



who shall be desirous for that purpose to execute all or any of the works mentioned in the section, and shall be unable to execute such works by reason of the objection, absence, or disability of any person whose land, property, or rights would be entered upon, cut through, interfered with, or affected by or for the purpose of such works, to apply to the sheriff for an order permitting the draining with an outfall through the land specified (s. 1). The Sheriff may make inquiry, and he may grant the order if he is satisfied that "the benefit to be derived from such drainage or improvement outweighs the damage to be done thereby, and the proposed method of drainage is in the whole circumstances the best, and that such drainage or improvement may be effected without material detriment to the lands, property, or rights proposed to be entered upon, cut through, interfered with, or affected, and that the damage to the lands, property, or rights so proposed to be entered upon, cut through, interfered with, or affected may be adequately and effectually compensated under the provisions of the Act" (s. 5). The Act contains further provisions for compensation; the removal of obstructions from rivers; protection of salmon fisheries, mills, and dwelling-houses; and entry on the lands in order to execute and maintain the works on obtaining permission from the Sheriff.

**163.** The legislature has made provision for advancing money for the purpose of drainage.<sup>1</sup> In an entailed estate a proprietor laying out money upon drainage and certain other improvements is a creditor of succeeding heirs for three-fourths of the sum laid out after deduction of all public burdens, liferents, and interest on debts which may affect the estate, provided that the sum laid out does not exceed four years' rent.<sup>2</sup> For a definition of "improvements" as applied to an entailed estate, see the Entail (Amendment) Act.<sup>3</sup>

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<sup>1</sup> 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9; 27 & 28 Vict. c. 114. See BORROWING POWERS, *ante*, Vol. II. p. 338.

<sup>2</sup> 10 Geo. III. c. 51, ss. 9 and 10 (Montgomery Act).

<sup>3</sup> 38 & 39 Vict. c. 61, s. 3.

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## DRAWN TEIND.

*See* TEINDS.

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## DRILLING (ILLEGAL).

*See* CRIME.

## DROVE ROAD.

*See* ROADS AND BRIDGES; SERVITUDES.

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## DRUGGING.

*See* CRIME.

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## DRUGS : DRUGGIST.

*See* MEDICINE AND PHARMACY.

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## DRUNKARDS, HABITUAL.

*See* INEBRIATES.

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## DRY MULTURES.

*See* THIRLAGE.

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## DUELLING.

*See* CRIME.

## DUKE.

*See* PEERAGE AND OTHER DIGNITIES.

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## DUMB.

*See* CRIME (PROCEDURE); WITNESS.

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## DUNG.

*See* LEASE.

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## DWELLING-HOUSE.

*See* CITATION; CRIME; FRANCHISE; HOUSING.

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## EARL.

*See* PEERAGE AND OTHER DIGNITIES.

## EARNEST.

*See* LEASE; MASTER AND SERVANT;  
*REI INTERVENTUS.*

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## EAVESDROP.

*See* SERVITUDES.

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## EAVESDROPPERS.

*See* EVIDENCE.

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## EDICT NAUTÆ, CAUPONES, STABULARII.

*See* CARRIAGE BY SEA; INNKEEPER.

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## EDICTAL CITATION.

*See* CITATION.



# EDUCATION.

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## PART I.—SCHOOLS.

### SECTION 1.—HISTORICAL.

#### SUBSECTION (1).—*Education Acts before 1872.*

**164.** Education in the schools of Scotland is regulated chiefly by the Education (Scotland) Act, 1872,<sup>1</sup> which repealed all former statutes so far as inconsistent with its provisions, and by the Education (Scotland) Act, 1918,<sup>2</sup> which remodelled the system of local organisation. But many Scots Acts dealing with the subject had been passed before 1872, and the importance of education from the point of view of national

<sup>1</sup> 35 & 36 Vict. c. 62.

<sup>2</sup> 8 & 9 Geo. V. c. 48.

welfare had been recognised as early as the Act 1494, c. 54. The modern legislation may be said to begin in 1696.<sup>1</sup>

**165.** The Act of 1696<sup>1</sup> provided that "there be a school settled and established, and a schoolmaster appointed, in every parish not already provided, by advice of the heritors and minister of the parish; and for that effect that the heritors in every parish meet and provide a commodious house for a school, and settle and modify a salary to a schoolmaster which shall not be under one hundred merks (£5, 11s. 1½d.) nor above two hundred merks, to be paid yearly at the terms, Whitsunday and Martinmas, by equal portions, and that they stent and lay on the said salary conform to every heritor's valued rent within the parish, allowing each heritor relief from his tenants of the half of his proportion for settling and maintaining of a school and payment of the schoolmaster's salary."

**166.** The Act of 1803,<sup>2</sup> on the preamble that the salaries fixed by the above Act were altogether inadequate, enacted that they were to be raised to not less than three hundred, nor more than four hundred, merks, and to be fixed by the heritors and ministers. A schoolhouse was to be provided in every parish where there was none already; and in parishes of great extent or population, a salary of six hundred merks might be provided, which sum might be divided among two or more teachers. In such case, the heritors were exempted from providing school premises.<sup>3</sup> The schoolmasters were to be approved by the presbytery, and were required to sign the Confession of Faith and the formula of the Church of Scotland. The heritors and ministers were to fix the fees, and the schoolmaster was "obliged to teach" such poor children as they recommended. The ministers were to superintend the schools, and the presbyteries were to take cognisance of the schoolmaster's conduct, and had power, after proof, to pass sentence of suspension or deprivation, their judgment being final. The offences with which the schoolmaster might be charged were: "neglect of duty," "immoral conduct," or "cruel and improper treatment" of his scholars. The schools established under s. 11 of this Act, additional to the original parish schools, were usually termed "side schools."

**167.** By the Act of 1838,<sup>4</sup> on the preamble that various parishes had been disunited *quoad sacra*, and places of worship erected in the Highlands, and that the parish schools in the Highlands and Islands were totally inadequate to the education of the people, the Treasury were authorised to provide for the endowment of additional schools in such parts of such divided parishes as they should judge proper. The money was to be invested by them, and the proceeds paid to schoolmasters in the said parishes after the heritors had provided schoolhouses. The teachers were subject to the provisions of the Act of 1803. The schools established under this Act were usually termed "parliamentary schools."

<sup>1</sup> 1696, c. 26.

<sup>3</sup> Sec. 11; *Macalister v. Macarthur*, 1854, 16 D. 736.

<sup>2</sup> 43 Geo. III. c. 54.

<sup>4</sup> 1 & 2 Vict. c. 87.

**168.** By the Parochial and Burgh Schoolmasters Act (Scotland), 1861,<sup>1</sup> the salaries of schoolmasters were raised to a minimum of £35 and a maximum of £80. The heritors and minister might discontinue existing "side schools" on providing to the schoolmaster an annual payment equal in amount to the full salary to which he was entitled, together with the annual value of any dwelling-house to which he may have been entitled as schoolmaster. They were also authorised to appoint female teachers. Instead of presbyteries, examiners appointed by the Universities were to examine schoolmasters. Schoolmasters, instead of signing the Confession of Faith and formula of the Church of Scotland, had to make a declaration that they would not teach any opinions opposed to the Bible or the Shorter Catechism, nor exercise their office to the prejudice of the Church of Scotland. The cognisance of the schoolmaster's conduct, given to the presbytery by the Act of 1803, was transferred to the Sheriff. Provision was made for enforcing the resignation of a schoolmaster who was unfit or inefficient.<sup>2</sup>

SUBSECTION (2).—*The Act of 1872<sup>3</sup> and Amendments before 1918.*

**169.** The primary object of the Act of 1872<sup>3</sup> was to transfer the powers and duties hitherto resting on the heritors and ministers of each parish, in the matter of education, to public boards elected by the rate-payers. National control was secured by the institution of the Scotch Education Department.<sup>4</sup> The expense of education was met by Government grants and local rates. Every parish and every royal or parliamentary burgh (as also eight burghs scheduled to the Act)<sup>5</sup> was constituted a school district under a school board.<sup>6</sup> For educational purposes the area of a parish was exclusive of any royal or parliamentary burgh situated therein.<sup>7</sup> In every parish which was partly landward and partly burghal a school board was constituted in the landward part, while the burghal part was under the jurisdiction of the burgh school board. Two or more school boards could combine for any purpose relating to public schools.<sup>8</sup> Powers were given to the Scotch Education Department to combine school districts,<sup>9</sup> to order that a burgh formerly included in a parish should form a new district,<sup>10</sup> and that a burgh should cease to have a separate school board and should form part of the parish in which it was situated.<sup>11</sup> In 1918 there were 947 school districts.

**170.** All parish schools,<sup>12</sup> *i.e.* those established under the Acts of 1696, 1803, 1838, and 1861, and all burgh schools<sup>13</sup> were transferred to the school board of the parish or burgh. A large number of schools had been

<sup>1</sup> 24 & 25 Vict. c. 107.

<sup>2</sup> For further information as to the law before 1872, see Dunlop's Parochial Law and Duncan's Parochial Ecclesiastical Law.

<sup>3</sup> 35 & 36 Vict. c. 62.

<sup>4</sup> See para. 174, *infra*.

<sup>5</sup> Sched. A.

<sup>6</sup> Secs. 1 and 8.

<sup>7</sup> Sec. 9.

<sup>8</sup> Sec. 42.

<sup>9</sup> Sec. 17; Education (Scotland) Act, 1883 (46 & 47 Vict. c. 56), s. 13; Education (Scotland) Act, 1908 (8 Edw. VII. c. 63) s. 22.

<sup>10</sup> Sec. 18.

<sup>11</sup> Sec. 19.

<sup>12</sup> Sec. 23.

<sup>13</sup> Sec. 24.



provided by the Free Church and other religious denominations, and it was provided that the trustees or managers of these schools might transfer them to the school board of the district. The school board could not purchase these schools, but could only accept the property as a gift.<sup>1</sup> Any property or money in trust for parish or burgh schools was transferred to the school board, and town councils were directed to pay to the school boards whatever sum they had been accustomed to contribute to the burgh schools out of the Common Good.<sup>2</sup> This last provision was applicable to all cases where in fact a contribution had been in use to be made by the Town Council, even though they were under no obligation to make it, and much less than forty years sufficed to establish a custom to make such a payment.<sup>3</sup> All schools transferred to the school boards, or afterwards opened by them, are "public schools."<sup>4</sup>

**171.** Every school board must provide from time to time a sufficient amount of accommodation for the children of the parish or burgh, but in considering the question they might take into account every school, whether public or not, which was available for the district.<sup>5</sup> Education was made compulsory between the ages of five and thirteen,<sup>6</sup> and the duty was laid on the Parochial Board of paying the fees of children whose parents were unable to pay them.<sup>6</sup> Penalties were imposed on parents who failed to send their children to school, and the prosecution of defaulting parents was in the hands of the Procurator-Fiscal on a report from the school board.<sup>7</sup> The school age was raised to fourteen in 1883,<sup>8</sup> and the payment of fees in public elementary schools was abolished in 1889.<sup>9</sup>

**172.** All teachers of schools transferred to the school boards became teachers under the boards, and were paid salaries by the boards, but the transfer was not to prejudice them "with respect to tenure of office, emoluments or retiring allowance as by law, contract or usage secured to them or enjoyed by them at the passing" of the Act of 1872.<sup>10</sup> A parish—but not a burgh<sup>11</sup>—teacher appointed before the passing of the 1872 Act held office *ad vitam aut culpam*. Teachers appointed by the school boards held office "during the pleasure of the school board."<sup>10</sup> But by the Public School Teachers (Scotland) Act, 1882,<sup>12</sup> provision is made for special procedure to be followed in dismissing a teacher. Against a resolution of dismissal, a teacher was given the right of appeal to the Scotch Education Department.<sup>13</sup>

<sup>1</sup> Secs. 38 and 39.

<sup>2</sup> Sec. 46; *Dunbar School Board v. Mags. of Dunbar*, 1876, 3 R. 631; *School Board of Greenock v. Mags. of Greenock*, 1890, 17 R. 969.

<sup>3</sup> *Perth School Board v. Mags. of Perth*, 1878, 6 R. 45; *Dunfermline School Board v. Mags. of Dunfermline*, 1878, 6 R. 51.

<sup>4</sup> Sec. 1.

<sup>5</sup> Secs. 26-30.

<sup>6</sup> Sec. 69.

<sup>7</sup> Sec. 70.

<sup>8</sup> 46 & 47 Vict. c. 56, s. 4.

<sup>9</sup> Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), ss. 22 (6), 88, and 89; Scottish Education Code.

<sup>11</sup> *Mitchell v. School Board of Elgin*, 1883, 10 R. 982.

<sup>12</sup> 45 & 46 Vict. c. 18.

<sup>10</sup> Sec. 55.

<sup>13</sup> Education (Scotland) Act, 1908 (8 Edw. VII. c. 63), s. 21.



**173.** The Act of 1918<sup>1</sup> remodelled the local organisation of school education, and carried further developments and changes which had been continuous since 1872.

## SECTION 2.—THE SCOTTISH EDUCATION DEPARTMENT.

**174.** A Committee of the Privy Council on Education in Scotland was instituted by the Act of 1872,<sup>2</sup> under the name of the "Scotch Education Department." In 1918 the name was altered to the "Scottish Education Department."<sup>3</sup> The Lord President of the Council is *ex officio* president, and the Secretary of State<sup>4</sup> for Scotland is vice-president.<sup>5</sup> The chief function of the Department is to supervise the administration of the Education Acts by the local Education Authorities. In so doing the Department (*a*) regulate the distribution of the grant made annually by Parliament for education in Scotland;<sup>6</sup> (*b*) frame the Code of Minutes dealing with education in accordance with which these grants are made;<sup>7</sup> (*c*) regulate and conduct the examination of candidates for certificates of competency as teachers;<sup>8</sup> (*d*) lay down minimum national scales of salaries for teachers, after consultation with representatives of the Education Authorities and the teaching profession;<sup>9</sup> (*e*) consider, adjust, and approve schemes<sup>10</sup> prepared by the Education Authorities for the following purposes: (1) constitution of school management committees,<sup>11</sup> (2) provision of all forms of primary, intermediate, and secondary education in day schools,<sup>12</sup> (3) exercise of powers to facilitate attendance at secondary schools and other institutions,<sup>13</sup> (4) scales of salaries for teachers,<sup>14</sup> (5) education of young persons;<sup>15</sup> (*f*) consider any revised scheme for these purposes, or order such a revised scheme;<sup>16</sup> and (*g*) appoint the times of elections of Education Authorities, and issue regulations for the conduct of such elections.<sup>17</sup>

## SECTION 3.—EDUCATION AUTHORITIES.

### SUBSECTION (1).—*Constitution.*

**175.** A Local Authority for the purposes of education (called the Education Authority) is elected<sup>18</sup> for each of the burghs—Edinburgh, Glasgow, Aberdeen, and Dundee,<sup>19</sup> and for each county.<sup>20</sup> These four

<sup>1</sup> 8 & 9 Geo. V. c. 48. In all subsequent references to the Education (Scotland) Acts, the Acts will be cited by the year in which they were passed only, *e.g.* 1872 Act, 1918 Act, etc. For full citation see note on p. 123, *infra*.

<sup>2</sup> 1872 Act, s. 1.

<sup>3</sup> 1918 Act, s. 30.

<sup>4</sup> Secretaries of State Act, 1926 (16 & 17 Geo. V. c. 18).

<sup>5</sup> Secretary for Scotland Act, 1885 (48 & 49 Vict. c. 61), ss. 6 and 7.

<sup>6</sup> 1872 Act, s. 67. <sup>7</sup> *Ibid.*, ss. 5 and 67.

<sup>8</sup> *Ibid.*, ss. 57 and 58.

<sup>9</sup> 1918 Act, s. 6 (1) (*c*).

<sup>10</sup> *Ibid.*, s. 27.

<sup>11</sup> *Ibid.*, s. 3; see para. 180, *infra*.

<sup>12</sup> *Ibid.*, s. 6 (1) (*a*).

<sup>13</sup> *Ibid.*, s. 6 (1) (*b*).

<sup>14</sup> *Ibid.*, s. 6 (1) (*c*).

<sup>15</sup> *Ibid.*, s. 15 (2) (*a*).

<sup>16</sup> *Ibid.*, s. 6 (2).

<sup>17</sup> *Ibid.*, Second Sched. 1 and 2.

<sup>18</sup> *Ibid.*, s. 1.

<sup>19</sup> *Ibid.*, s. 1 (*a*) and Sched. I. (Leith was amalgamated in Edinburgh by an extension of boundaries in 1920 (10 & 11 Geo. V. clxxxvii. s. 71).

<sup>20</sup> 1918 Act, s. 1 (*b*).

burghs and the thirty-three counties are each known as an education area.<sup>1</sup> Each education area is divided by the Secretary of State for Scotland into electoral districts. The Secretary of State also fixes the number of members of each Authority, and apportions the members among the electoral districts.<sup>2</sup> Elections are triennial,<sup>3</sup> and those entitled to vote<sup>4</sup> are the persons registered as local government electors for the electoral district under the Representation of the People Act, 1918.<sup>5</sup> Any person, male or female,<sup>6</sup> and not subject to legal or statutory disqualification<sup>7</sup> may be elected a member of the authority.

#### SUBSECTION (2).—*Election.*

**176.** The method of voting at the election of an Authority is according to the principle of proportional representation,<sup>8</sup> each elector having one transferable vote.<sup>9</sup> The time of the election is fixed by the Department, and the election is conducted by the retiring Authority under regulations laid down by the Department.<sup>10</sup> The elections are subject to the provisions of the Elections (Scotland) (Corrupt and Illegal Practices) Act, 1890,<sup>11</sup> and the election of a candidate may be challenged by petition to the Sheriff under that Act.<sup>12</sup> When the election of a candidate has been declared invalid, the Education Authority, provided a quorum exists, may nominate another member in room of the person who has been unseated.<sup>13</sup> An election may be reduced on grounds other than those provided for in the Corrupt Practices Act of 1890.<sup>14</sup> Should an election not take place, or the full number of members not be elected, the Department may order a new election or may allow the retiring Authority to continue in office.<sup>15</sup> If the full number of members is not elected, the Department is not entitled to allow the candidates who have been nominated to be declared elected and to nominate members to fill the vacancies.<sup>16</sup> If there is not a quorum on account of members being unseated on petition to the Sheriff, or if the Authority having a quorum fail for three weeks to nominate a new member in place of one unseated, the Department may order a new election of as many members as are required to make up the full number of the Authority.<sup>13</sup> A casual vacancy is filled up by the Education Authority.<sup>15</sup> A person so nominated by the Authority does not become a member unless he accepts office.<sup>17</sup> If the Authority fail for eight weeks to fill up a vacancy occurring by the death or resignation of a member, the Department may nominate a member to fill the vacancy, or may order

<sup>1</sup> 1918 Act, s. 1.

<sup>2</sup> *Ibid.*, s. 2.

<sup>3</sup> *Ibid.*, Sched. II. s. 1.

<sup>4</sup> *Ibid.*, s. 22.

<sup>5</sup> 8 Geo. V. c. 64.

<sup>6</sup> 1918 Act, s. 28.

<sup>7</sup> *Ibid.*, Sched. II. s. 5, as modifying the Local Government (Scotland) Act, 1894, s. 20 (1), (2); Bankruptcy (Scotland) Act, 1913, s. 183. See FRANCHISE.

<sup>8</sup> 8 Geo. V. c. 64, s. 41 (6).

<sup>9</sup> 1918 Act, s. 23.

<sup>10</sup> *Ibid.*, Sched. II. ss. 1 and 2.

<sup>11</sup> 53 & 54 Vict. c. 55.

<sup>12</sup> Secs. 30 and 31.

<sup>13</sup> 1872 Act, s. 15.

<sup>14</sup> *Kerr v. Hood*, 1907 S.C. 895; *Hodge v. School Board of Ballingry*, 1897, 35 S.L.R. 634.

<sup>15</sup> 1918 Act, Sched. II. s. 6.

<sup>16</sup> *Duncan v. Crichton*, 1892, 19 R. 594.

<sup>17</sup> *Cabrach School Board v. Macdonald*, 1896, 23 R. 541.

the election of a member to fill it.<sup>1</sup> If the Department do not so fill the vacancy, the Authority may fill it even after eight weeks.<sup>2</sup> A member may resign on giving one month's notice,<sup>1</sup> and if a member absents himself for six successive months from all meetings of the Authority except from temporary illness or other cause to be approved by the Authority, he ceases to be a member and his office becomes vacant.<sup>3</sup> If there cease to be a quorum, the Department may nominate, or order the election of, as many members as are required to make up the full number of the Authority.<sup>4</sup>

### SUBSECTION (3).—*Powers.*

**177.** The whole powers, duties, and liabilities of the school boards within each education area were transferred to the Education Authority of the area by the 1918 Act.<sup>5</sup> An Education Authority is a body corporate. Service on an Education Authority of legal processes and notices is effected by service on their clerk.<sup>6</sup> A quorum of an Education Authority is one-fourth of the members, but in no case less than three,<sup>7</sup> except in considering the dismissal of a teacher, in which case the quorum is one-half.<sup>8</sup>

**178.** Education Authorities may from time to time appoint Committees to exercise any of their powers,<sup>9</sup> other than<sup>10</sup> their powers and duties with regard to (a) raising money by rate or loan, and the general control of expenditure; (b) the acquisition and holding of land; (c) the appointment, transfer, remuneration, and dismissal of teachers; <sup>11</sup> (d) the appointment of bursars, and the exercise of their powers to facilitate attendance at secondary schools and other institutions; <sup>12</sup> and (e) the recognition, establishment, or discontinuance of intermediate or secondary schools or of centres of advanced technical instruction.

**179.** An Education Authority may for educational purposes acquire, purchase, feu, or take on lease any land,<sup>13</sup> including water and any servitude or right in or over land or water.<sup>14</sup> Acquisition of land by an Education Authority by agreement is subject to the provisions of the Lands Clauses Acts.<sup>15</sup> An Authority may purchase land compulsorily by an order confirmed by the Department, and in certain cases by Parliament.<sup>16</sup> With the sanction of the Department an Education Authority may discontinue, or change the site of, a school, and may sell any land or buildings connected with a school so discontinued, or the site of which is so changed.<sup>17</sup> An Education Authority has full power to manage, alter, or enlarge a school, and with the consent of the Department to excamb or alienate any lands or heritages transferred to them under the 1918 Act.<sup>18</sup>

<sup>1</sup> 1878 Act, s. 15, as amended by 1918 Act, Sched. VI.

<sup>2</sup> *Cabrach School Board v. Macdonald*, 1896, 23 R. 541.

<sup>4</sup> *Ibid.*, s. 17.

<sup>5</sup> 1918 Act, Sched. IV.

<sup>3</sup> 1878 Act, s. 16.

<sup>6</sup> *Ibid.*, Sched. II. s. 7.

<sup>7</sup> *Ibid.*, Sched. II. s. 10.

<sup>8</sup> *Ibid.*, s. 24.

<sup>9</sup> *Ibid.*, Sched. II. s. 11.

<sup>10</sup> *Ibid.*, s. 3, proviso as amended 1925 Act, s. 3 and Sched. II. s. 11.

<sup>11</sup> *Kelly v. Glasgow Education Authority*, 1928, S.N. 25.

<sup>12</sup> 1918 Act, s. 6 (1) (b).

<sup>13</sup> *Ibid.*, s. 11 (1).

<sup>14</sup> *Ibid.*, s. 11 (4).

<sup>15</sup> *Ibid.*, s. 11 (2).

<sup>16</sup> *Ibid.*, s. 11 (3).

<sup>17</sup> 1872 Act, s. 36.

<sup>18</sup> 1918 Act, Sched. IV. s. 4.



## SECTION 4.—SCHOOL MANAGEMENT COMMITTEES.

**180.** Each Education Authority must prepare a scheme for the institution of committees, known as school management committees, for the management of schools or groups of schools under their control throughout their area.<sup>1</sup> The committee must include representatives of the Authority, and of the parents of children attending the schools under the management of the committee, at least one teacher, and at least one member representative of the religious beliefs of parents attending any transferred school<sup>2</sup> under the committee's management.<sup>3</sup> Subject to the provisions of the scheme, school management committees have all the powers and duties of the Authority in regard to general management and supervision of the school or schools, including attendance thereat, but excluding the duties reserved to the Authority itself.<sup>4</sup>

## SECTION 5.—PROVISION OF SCHOOL ACCOMMODATION.

SUBSECTION (1).—*Public Schools.*

**181.** It is the duty of each Education Authority to provide sufficient accommodation in public schools for all children in their area for whose education efficient and suitable provision is not otherwise made.<sup>5</sup> The Authority must from time to time ascertain the requirements of their area, taking into account all schools, whether public or not, within the area or so situated as to be conveniently available.<sup>6</sup> If they are of opinion that additional accommodation is required, they report their opinion and determination to the Department who may approve of the report, with or without alteration, or may order an inquiry.<sup>7</sup> If they satisfy the Department that it would involve less cost to provide facilities for conveying children to an existing school than to provide additional accommodation or to continue an existing school, the Authority may provide such facilities.<sup>8</sup> The Department may require returns to be made by the Authority from time to time with respect to the schools and the number of children requiring education.<sup>9</sup> The Department may appoint inspectors to examine the schools and to inquire into the accuracy of returns, or if the Authority fail to make returns, to prepare them at the expense of the Authority.<sup>10</sup> If the Department decide that additional accommodation is required, whether so determined by the Authority or not, the Authority must provide such additional accommodation without delay.<sup>11</sup> If the Authority fail to provide such additional accommodation, or to keep existing schools efficient, they may be summarily compelled to do so on petition and complaint to the Court of Session at the instance of the Lord Advocate.<sup>12</sup> The decision of the Department on a question relating to the supply of school accommoda-

<sup>1</sup> 1918 Act, s. 3 as amended by 1925 Act, s. 3 and 1918 Act, Sched. III.

<sup>2</sup> See para. 185, *infra*.

<sup>3</sup> 1918 Act, s. 3 (1).

<sup>4</sup> 1925 Act, s. 3 proviso; see para. 178, *supra*.

<sup>5</sup> 1872 Act, s. 26.

<sup>6</sup> *Ibid.*, s. 27.

<sup>7</sup> *Ibid.*, s. 28.

<sup>8</sup> 1925 Act, s. 4.

<sup>9</sup> 1872 Act, ss. 31-35.

<sup>10</sup> *Ibid.*, s. 33.

<sup>11</sup> *Ibid.*, ss. 28 and 36.

<sup>12</sup> *Ibid.*, s. 36.



tion may be reviewed by the Department,<sup>1</sup> but the Court will not interfere with their determination unless they have gone outwith the Acts, or have failed to apply their minds to the question.<sup>2</sup>

SUBSECTION (2).—*Non-public Schools.*

**182.** As already mentioned,<sup>3</sup> Education Authorities include in their schemes for the provision of education within their areas schools which are not under their own management. So far as these schemes are approved by the Department, the Authorities may contribute to the maintenance of schools not under their own control but included in their schemes. It is a condition of such grants that the teachers in such schools are remunerated at a rate not lower than the rate applicable to teachers of similar qualifications employed by the Authorities. The Authorities may make a reasonable representation of the Authority on the governing body of such schools a condition of such a grant.<sup>4</sup> The Authorities must, however, continue to contribute to the maintenance of schools which are not public schools, and which are not run for private profit, but which were before 21st November 1918 recognised by the Department as secondary or intermediate schools,<sup>5</sup> and were then in receipt of grants from the Department. The grant is to be made so long as the schools continue to be recognised by the Department, and is to be not less in amount than the sum paid in the year ending 15th May 1914, but is not to exceed the amount by which the income of the school falls short of expenditure. Representation of the Authority on the governing body of the school is not a condition of the latter grant.<sup>6</sup>

SUBSECTION (3).—*Schools in other Areas.*

**183.** The financial obligations of the Authorities may extend to schools outside their own areas. If a school provided by an Authority or other governing body, and not conducted for profit, is attended by children whose parents reside outwith the education area in which the school is situated, the Authority within whose area the parents reside must contribute to the Authority or other governing body owning the school a sum equal to the cost of educating such children—including in such cost repayment of and interest on loans for capital expenditure—but under deduction in the case of a public school of income from all sources other than the education rate, and in the case of a school not a public school of income from grants made by the Department and from fees. Such a payment, however, is not to be made out of the education rate in respect of any child in whose case it is shewn to the satisfaction of the Department that accessible accommodation is available in a

<sup>1</sup> *Lord Advocate v. Strathmiglo School Board*, 1876, 14 S.L.R. 108.

<sup>2</sup> *Lord Advocate v. Stow School Board*, 1876, 3 R. 469; *McLean v. Kilbrandon and Kilchattan School Board*, 1878, 15 S.L.R. 437.

<sup>3</sup> Para. 181, *supra*.

<sup>4</sup> 1918 Act, s. 9 (1).

<sup>5</sup> 1908 Act, s. 17 (4).

<sup>6</sup> 1918 Act, s. 9 (2).

suitable school within its area, regard being had to all the circumstances, including the religious beliefs of the parents.<sup>1</sup>

**184.** Two cases have given rise to difficulty under the last section. Where pauper children chargeable to a parish council were boarded out with persons known as "guardians" who did not reside within the area which included the parish chargeable, the "guardians" were held to be the "parents," and accordingly no contribution was payable by the Authority whose area included the parish chargeable with the children to the Authority in whose area the "guardians" resided.<sup>2</sup> Where an Authority granted bursaries to children to facilitate their secondary education with a free choice of school, and the majority of such children attended a school under a neighbouring Authority and boarded during the week in the town in which that school was situated, it was held that the "parents" were the natural parents and not the persons with whom the children boarded. The Authority granting the bursaries was accordingly under obligation to contribute to the cost of their education in the school they attended.<sup>3</sup>

#### SECTION 6.—TRANSFERRED SCHOOLS.

**185.** Though the provisions of the 1872 Act<sup>4</sup> relating to the transfer of voluntary and denominational schools had been taken advantage of in a very large number of cases, many new denominational schools had been opened. The sections of the 1872 Act relating to transfer are not repealed, but new provisions relating to transfer are given in the 1918 Act.<sup>5</sup> The new provisions apply to all "voluntary schools," i.e. "State-aided day schools not provided by an Education Authority."<sup>6</sup> From these provisions are excluded residential institutions which are either schools for blind, deaf, or defective children, shewn to the satisfaction of the Department by the persons vested with the title of the school to be attended largely by children whose parents or guardians are resident outwith the education area in which the school is situated, or orphanages shewn to the satisfaction of the Department by the persons vested with the title of the orphanage to be required for the proper education of children destitute of efficient guardianship.<sup>7</sup>

**186.** The persons vested with the title of any voluntary school, with the consent of the trustees of any trust upon which the school is held, might transfer the school, with the site, buildings, and furniture, by sale, lease, or otherwise to the Education Authority, who were bound to accept the transfer on such conditions as to price, rent, or other consideration as might be agreed on, or failing agreement be determined by an arbiter appointed by the Department.<sup>8</sup> Any school so transferred becomes a public school, to be held, maintained, and managed by the

<sup>1</sup> 1918 Act, s. 10.

<sup>2</sup> *Bute Education Authority v. Glasgow Education Authority*, 1923 S.C. 675.

<sup>3</sup> *Ayrshire Education Authority v. Bute Education Authority*, 1926 S.C. 169.

<sup>4</sup> Secs. 38 and 39.

<sup>5</sup> Sec. 18.

<sup>6</sup> 1897 Act, 60 & 61 Vict. c. 62, s. 2.

<sup>7</sup> 1918 Act, s. 18 (6).

<sup>8</sup> Sec. 18 (1).

Authority, who are entitled to receive grants therefor as a public school, and have the sole power of regulating the curriculum and appointing teachers.<sup>1</sup> Such a transferred school is to be held, maintained, and managed as a public school of the same character and status as at the date of transfer and providing similar instruction to that provided at that date.<sup>2</sup>

**187.** Grants earned by such a school before transfer became payable to the Authority, whose duty was to apply them in payment of any liabilities on account of the school then outstanding, and so far as not required for that purpose towards the maintenance of the school.<sup>3</sup> Any deficiency must be met by the former managers of the school.<sup>4</sup> After the expiry of two years from the passing of the 1918 Act,<sup>5</sup> no grants shall be made to a voluntary school not transferred to the Authority, unless the Department are of opinion that further time is required for the completion of the transfer.<sup>6</sup>

**188.** Voluntary schools established after the passing of the 1918 Act<sup>5</sup> may be transferred to the Authority with the consent of the Department in a similar manner.<sup>7</sup>

**189.** On the transfer of a voluntary school, the existing teachers become teachers of the Authority, and are placed on the same scale of salaries as the teachers of corresponding qualifications in corresponding positions in the other schools of the same Authority. Teachers subsequently appointed to such schools must be approved as to qualifications by the Department, and as to religious beliefs and character by representatives of the church or religious denomination in whose interests the school has been previously conducted.<sup>1</sup> Any question as to the fulfilment of these conditions as to teachers, and the conditions as to religious instruction in such schools shall be referred to the Department, whose decision is final.<sup>8</sup>

**190.** If the Department are satisfied, upon representations made to them by the Authority of any education area, or by any church or denominational body acting on behalf of parents of children belonging to such church or body, and after such inquiry as the Department deem necessary, that a new school is required for the accommodation of children whose parents are resident in the education area, regard being had to the religious belief of such parents, the Education Authority may provide a new school to be held, maintained, and managed by them on conditions as to appointment of teachers<sup>9</sup> and as to time of religious instruction,<sup>10</sup> so far as applicable, the same as those in transferred schools.<sup>11</sup>

**191.** If at any time after the expiry of ten years from the transfer of a denominational school, or the institution of a new denominational school by the Authority, the Education Authority by whom the school is maintained are of opinion that the school is no longer required, or

<sup>1</sup> Sec. 18 (3).

<sup>2</sup> *Norfor v. Aberdeenshire Education Authority*, 1924 S.C. 590.

<sup>3</sup> Sec. 18 (2).

<sup>4</sup> *Strong on the Education (Scotland) Act*, 1918, p. 51.

<sup>5</sup> 21st November 1918.

<sup>6</sup> Sec. 18 (5).

<sup>7</sup> Sec. 18 (7); *Bonnybridge Roman Catholic School's Trs. v. Stirlingshire Education Authority*, 1928, S.N. 56 (under Appeal).

<sup>8</sup> Sec. 18 (4).

<sup>9</sup> See para. 189, *supra*.

<sup>10</sup> See para. 200, *infra*.

<sup>11</sup> Sec. 18 (8).



that, looking to the religious belief of the parents of the children attending the school, the special conditions <sup>1</sup> ought no longer to apply thereto, the Authority may so represent to the Department. If the Department, after such inquiry as they may deem necessary, are of the same opinion and so signify, the Authority may discontinue the school, or may hold, maintain, and manage it as a public school free from these conditions. In the case of a transferred school being so discontinued or freed from conditions the Authority shall pay to the trustees by whom the school was transferred such compensation, if any, as may be agreed, or as may be determined, failing agreement, by an arbiter appointed by the Department.<sup>2</sup> This procedure may be adopted before expiry of the ten years, if the trustees concur.<sup>3</sup>

#### SECTION 7.—COMPULSORY EDUCATION.

**192.** It is the duty of every parent, including guardian and person liable to maintain, or having the actual custody of a child,<sup>4</sup> to provide efficient education for his children while they are between the ages of five and fourteen.<sup>5</sup> Exemption from attendance at school may be granted by an Authority, after inquiry into the whole circumstances, to individual children over twelve for such time and on such conditions as to further attendance at school up to fourteen as the Authority may fix.<sup>6</sup> These ages are raised to fifteen and thirteen by the 1918 Act,<sup>7</sup> but the appointed day for the operation of the extension of school age has not yet been fixed. For educational purposes, in order to simplify the working of the schools, certain fixed dates, and not the date of a child's birth, are taken. It is the duty of the Education Authority, subject to the approval of the Department, to fix two or more dates in each year for the commencement or termination of school attendance for children in their area, and a child is deemed to become five, fourteen, or fifteen on the first of these dates occurring after the fifth, fourteenth, or fifteenth birthday.<sup>8</sup>

**193.** A parent is freed from his obligation to educate in the case of the illness of a child or other unavoidable cause, or if there is no public or inspected school which the child can attend within three miles by road of its home.<sup>9</sup> An Authority may provide for the conveyance of children to school,<sup>10</sup> but in spite of such provision three miles' distance is still a reasonable excuse.<sup>11</sup> A parent is not obliged to send his children to school if they are being efficiently educated otherwise. Children at a public school must conform to all the regulations of the school, and a parent is not entitled to refuse to allow a child to take part in the ordinary work of the school, *e.g.* physical training.<sup>12</sup>

**194.** It is the duty of the Authority to take proceedings against parents who are neglecting without reasonable excuse <sup>13</sup> to educate their

<sup>1</sup> Sec. 18 (3).

<sup>2</sup> Sec. 18 (9).

<sup>3</sup> 1925 Act, s. 1.

<sup>4</sup> 1872 Act, s. 1.

<sup>5</sup> 1908 Act, s. 7 (1).

<sup>6</sup> 1901 Act, s. 3.

<sup>7</sup> Sec. 14 (1).

<sup>8</sup> 1908 Act, s. 7 (2) and (3); 1918 Act, s. 14 (2).

<sup>9</sup> 1883 Act, s. 11.

<sup>10</sup> 1908 Act, s. 3 (3); 1918 Act, Sched. V. s. 5; 1925 Act, s. 4.

<sup>11</sup> *Mackenzie v. Smith*, 1927, J.C. 47.

<sup>12</sup> *Barr v. Smith*, 1903, 5 F. (J.) 24.

<sup>13</sup> See para. 193, *supra*



children,<sup>1</sup> unless for reasons to be recorded in their minutes they think it inexpedient to do so.<sup>2</sup> The Authority appoint officers to ascertain and report what parents have failed to educate their children.<sup>3</sup> On being informed that a parent has failed to provide education for his children or to send them to school, the School Management Committee<sup>4</sup> are authorised to summon the parent before them. If he fails to appear, or to satisfy the Committee that his failure to educate is not without reasonable excuse, and does not undertake to the satisfaction of the committee to provide education, a written certificate is sent to the Procurator-Fiscal or other person appointed by the Authority<sup>5</sup> to prosecute. On prosecution before a Court of summary jurisdiction,<sup>6</sup> a penalty of twenty shillings or fourteen days' imprisonment may be imposed on the parent.<sup>3</sup> This procedure may be repeated at intervals of not less than one month.<sup>7</sup> In addition to the penalty imposed, the Court may award expenses against a parent up to a limit of twenty shillings.<sup>8</sup> Expenses may not be awarded against the Procurator-Fiscal,<sup>8</sup> or other prosecutor.<sup>6</sup> The reasonable expenses of the prosecution as certified by the Court, so far as not awarded against and recovered from a parent, are paid out of the education fund.<sup>8</sup>

**195.** A certificate by the Authority or School Management Committee is necessary for prosecution,<sup>9</sup> but the certificate need not be recorded in the minutes of the proceedings.<sup>10</sup> The certificate must state the relationship of the accused to the children, and must describe the children accurately.<sup>11</sup> The father, not the mother, is to be prosecuted for failure to educate.<sup>12</sup> In the case of an illegitimate child, the parent or other person who has the actual custody of the child is responsible.<sup>13</sup> The complaint must specify the exact penalty to which the accused is liable.<sup>14</sup> The Act and section founded on must be specified in the complaint.<sup>15</sup> The person appointed to prosecute need not be a law agent.<sup>16</sup> A person appointed to prosecute may not delegate his duty.<sup>17</sup> A member of the Authority, probably also a member of the School Management Committee, may not sit as a member of the Court in a prosecution for failure to educate.<sup>6</sup>

**196.** An alternative method of proceeding is that the School Management Committee should, after due warning to the parent, summon him before them, with or without the child, and require from him full explanation respecting his failure. If he, or some person on his behalf, fail to appear, or if he or other person on his behalf fail to satisfy the

<sup>1</sup> 1872 Act, s. 70, as amended 1883 Act, s. 5 (1).

<sup>2</sup> 1883 Act, s. 12.

<sup>3</sup> 1872 Act, s. 70.

<sup>4</sup> 1918 Act, s. 3.

<sup>5</sup> *Hiddleston v. Wilson*, 1924, J.C. 62.

<sup>6</sup> 1883 Act, s. 14.

<sup>7</sup> 1878 Act, s. 28.

<sup>8</sup> 1872 Act, s. 71.

<sup>9</sup> *France v. Anderson*, 1877, 4 R. (J.) 42; *Macaulay v. Macdonald*, 1887, 14 R. (J.) 43.

<sup>10</sup> *Barr v. Smith*, 1903, 5 F. (J.) 24.

<sup>11</sup> *Thomson v. Scott*, 1901, 3 F. (J.) 79.

<sup>12</sup> *Macdonald v. Lamont*, 1892, 19 R. (J.) 41.

<sup>13</sup> *Gair v. Black and Wiseman*, 1879, 4 Couper 305.

<sup>14</sup> *Mackenzie v. Cadenhead*, 1897, 25 R. (J.) 44.

<sup>15</sup> *Macaulay v. Macdonald*, *supra*.

<sup>16</sup> *School Board of North Uist v. Macdonald*, 1885, 5 Couper 614.

<sup>17</sup> *McMurdo v. McCracken*, 1907 S.C. (J.) 1; *Thomson v. Scott*, *supra*.

Committee that he has not failed in his duty without reasonable excuse,<sup>1</sup> the Committee may order in writing that the child do attend some public or inspected school willing to receive him and named in the order, being either such as the parent may select, or if he does not select any, then such as the Committee think expedient, and the child shall attend such school every time the school is open, or in such other regular manner as is specified in the order. Such an order is known as an attendance order. Any parent aggrieved by the making of such an order may appeal to the Sheriff, who has power to confirm or annul the order, and the Sheriff's decision is final.<sup>2</sup> Failure to comply with the order without reasonable excuse is a ground for prosecution as under the other method of proceeding,<sup>3</sup> with the additional power to the Court in the case of a second or subsequent case of non-compliance with the order, to ordain the child to be sent to a certified day industrial or certified industrial school.<sup>4</sup> Prosecution for continued failure to comply with an attendance order may not be repeated at intervals of less than one month.<sup>4</sup>

**197.** These two methods of procedure are distinct and cannot be combined.<sup>5</sup> The method of prosecution under section 70 of the 1872 Act is still competent, even though the real question at issue between the parent and the Authority was the selection of the school which the children were to attend.<sup>6</sup> Prosecution under the 1872 Act, however, should not be resorted to where there is a question of principle, such as a parent's right to select a school, at issue between the parent and the Authority.<sup>7</sup>

**198.** If a person habitually wanders from place to place and takes with him a child of school age, he shall, unless he proves that the child is totally exempted from school attendance, or that the child is not prevented by being taken with him from receiving efficient education, be deemed not to be exercising proper guardianship over the child, and the child may be sent to a certified industrial school.<sup>8</sup> Without prejudice to the requirements of the Education Acts as to school attendance or to proceedings thereunder, this rule does not apply during the months of April to September inclusive to any child whose parent<sup>9</sup> is engaged in a trade or business of such a nature as to require him to travel from place to place, and who has obtained a certificate of having made not less than two hundred attendances at a public or inspected school during the months of October to March immediately preceding.<sup>10</sup>

**199.** The syllabus of education to be provided in public schools is regulated by the Code of Minutes laid down by the Department, and by the schemes prepared by the Authorities under the 1918 Act.<sup>11</sup>

<sup>1</sup> See para. 193, *supra*.

<sup>2</sup> 1908 Act, s. 8.

<sup>3</sup> See para. 194, *supra*.

<sup>4</sup> Day Industrial Schools (Scotland) Act, 1893 (56 Vict. c. 12), s. 4.

<sup>5</sup> *Macaulay v. Macdonald*, 1887, 14 R. (J.) 43; *Macaulay v. School Board of North Uist*, 1887, 15 R. 99.

<sup>6</sup> *Calder v. Alexander*, 1926, J.C. 51.

<sup>7</sup> *Calder, supra*, per Lord Justice-General Clyde at p. 63.

<sup>8</sup> Children Act, 1908 (8 Edw. VII. c. 67), s. 58 (1) (b).

<sup>9</sup> 1872 Act, s. 1.

<sup>10</sup> Children Act, 1908, s. 118.

<sup>11</sup> Sec. 6 (1) (a).

## SECTION 8.—RELIGIOUS TEACHING.

**200.** Before the passing of the 1872 Act "it had been the custom in the public schools to give instruction in religion to children whose parents did not object to the instruction so given, but with liberty to parents, without forfeiting any of the other advantages of the schools, to elect that their children should not receive such instruction."<sup>1</sup> This custom was continued by the Act of 1872, subject to the following conditions:—<sup>2</sup> (1) Every public school, and every school subject to inspection, and in receipt of any public money, shall be open to children of all denominations, and any child may be withdrawn by his parents from any instruction in religious subjects and from any religious observance in any such school; (2) no child shall in any such school be placed at any disadvantage with respect to the secular instruction given therein by reason of the denomination to which his parents belong, or by reason of his being withdrawn from any instruction in religious subjects; (3) religious observances may be practised, and religious instruction given, only at the beginning or the end, or the beginning and the end, of any meeting of the school for elementary instruction, and the times shall be specified in a table approved by the Department. This custom is still continued,<sup>3</sup> subject to the proviso that the time given to religious observances and instruction in transferred schools shall not be less than that customary in these schools before transfer.<sup>4</sup>

**201.** His Majesty's inspectors of schools do not examine in religious knowledge,<sup>5</sup> but it has been the custom for the local ministers to be appointed by the school boards and Education Authorities to act as examiners. In transferred schools the Authority shall appoint a supervisor of religious instruction in each school, without remuneration, who is approved as to religious belief and character by representatives of the denomination in whose interests the school was formerly conducted, and it is the duty of the supervisor to report to the Authority. The supervisor has right of entry to the school at all times set apart for religious instruction or observances, and the Authority must give facilities for the holding of religious examinations in the school.<sup>4</sup> No grants are given for instruction in religious subjects.<sup>6</sup>

**202.** An Authority may make an existing school, even one transferred under the 1872 Act, a denominational school, *i.e.* a school in which the religious instruction given is that of a particular denomination.<sup>7</sup> Provision is made for the erection of new denominational schools under the Authority.<sup>8</sup>

## SECTION 9.—SCHOOL BOOKS.

**203.** An Authority may provide any or all of the children attending State-aided schools in their area with school books, writing material,

<sup>1</sup> 1872 Act, preamble.<sup>2</sup> *Ibid.*, s. 68.<sup>3</sup> 1918 Act, s. 7.<sup>4</sup> *Ibid.*, s. 18 (3), proviso iii.<sup>5</sup> 1872 Act, s. 66.<sup>6</sup> *Ibid.*, s. 67, proviso.<sup>7</sup> *Glasgow School Board v. Anderston Kirk Session*, 1910 S.C. 195.<sup>8</sup> See paras. 188 and 190, *supra*.



stationery, and similar articles where the Authority think that such provision is required.<sup>1</sup>

### SECTION 10.—TEACHERS.

#### SUBSECTION (1).—*Definition.*

**204.** "Teacher" includes schoolmaster, schoolmistress, assistant teacher, pupil teacher, sewing mistress, and every person who forms part of the educational staff of a school.<sup>2</sup>

#### SUBSECTION (2).—*Training.*

**205.** The training of teachers is governed by regulations laid down by the Department,<sup>3</sup> and certificates of competency are issued by the Department to students who have passed through the prescribed training and passed the necessary examinations. This prescribed training is carried out in training colleges in each of the four university towns, or partly in the training colleges and partly in the universities. The training colleges are governed by provincial committees, which are representative of the universities and other educational bodies. Teachers who hold a certificate of competency are known as "certificated teachers." Though teachers may be recognised without a certificate, the head teacher of a public school must be a certificated teacher.<sup>4</sup>

#### SUBSECTION (3).—*Appointment and Dismissal.*

**206.** Teachers appointed by an Education Authority hold office at the pleasure of the Authority.<sup>5</sup> But in dismissing a teacher an Authority must follow the procedure prescribed by statute.<sup>6</sup> Written notice of a motion to dismiss a teacher must be given to the teacher and to each member of the Authority at least three weeks before the meeting for its consideration. The quorum at such a meeting is not less than one-half of the members of the Authority. A majority of not less than two-thirds of the members present is required to carry a resolution to dismiss. The procedure prescribed must be followed exactly.<sup>7</sup> Power to dismiss may not be delegated to any committee or other body than the Authority.<sup>8</sup> A teacher is entitled to reasonable notice of dismissal.<sup>9</sup> The statutory procedure does not apply to a teacher appointed *ad interim* and for a limited time.<sup>10</sup> An Authority<sup>11</sup> or a school management com-

<sup>1</sup> 1908 Act, s. 3 (6).

<sup>2</sup> 1872 Act, s. 1.

<sup>3</sup> *Ibid.*, ss. 57–59.

<sup>4</sup> *Ibid.*, s. 56.

<sup>5</sup> *Ibid.*, s. 55.

<sup>6</sup> 1918 Act, s. 24.

<sup>7</sup> *Robson v. School Board of Gordon*, 1888, rep. in *Graham's Manual of the Education Acts*, p. 385; *Macfarlane v. Mochrum School Board*, 1875, 3 R. 88.

<sup>8</sup> 1925 Act, s. 3, proviso and 1918 Act, Sched. II. s. 11; *School Board of Barvas v. Macgregor*, 1891, 18 R. 647.

<sup>9</sup> *Morrison v. Abernethy School Board*, 1876, 3 R. 945; *Robson v. Overend*, 1878, 6 R. 213; *Hinds v. School Board of Dunbar*, 1883, 10 R. 930.

<sup>10</sup> *Robson v. Hawick School Board*, 1900, 2 F. 411.

<sup>11</sup> 1908 Act, s. 21; *Robson v. Hawick School Board*, *supra*; *Aird v. Tarbert School Board*, 1907 S.C. 305.



mittee<sup>1</sup> may suspend a teacher summarily, but such suspension does not affect a teacher's right to salary or other emoluments.

207. A teacher who has been dismissed may within six weeks after the adoption of a resolution for dismissal appeal to the Department for an inquiry into the reasons for dismissal. If the Department, as the result of such inquiry as they see fit to make, are of opinion that the dismissal was not reasonably justifiable, they may communicate their opinion to the Authority with a view to the reconsideration of the resolution. If the Authority do not depart from the resolution the Department may attach to the resolution the condition that the Authority pay to the teacher such sum not exceeding one year's salary as the Department may determine.<sup>2</sup>

#### SUBSECTION (4).—*Salaries.*

208. Teachers' salaries are fixed at the discretion of the individual Education Authorities,<sup>3</sup> but they must be not less in amount than those provided for in the Minimum National Scales of Salaries laid down by the Department.<sup>4</sup> It is the duty of each Education Authority to submit a scheme of scales of salaries for the teachers in their employment satisfying the conditions of the Minimum National Scales. These local schemes may be revised at any time, and must be revised if the Department requires the Authority to do so.<sup>5</sup> A revised scheme may not be put into force until the approval of the Department has been communicated to the Authority.<sup>6</sup>

#### SUBSECTION (5).—*Superannuation.*

209. Teachers in public schools have the benefit of the Scottish Teachers' Superannuation Fund, from which on retiral they are given a lump-sum payment and an annual pension. The fund is provided by contributions by Education Authorities and school managers, grants from the Education (Scotland) Fund, and by contributions from teachers proportionate to their salaries. A teacher may retire on full pension at sixty, and must retire at sixty-five, unless the Department extend his period of service. A proportion of pension is payable to those who retire at an earlier age. Education Authorities and governors of endowed schools may pay retiring allowances to teachers who resign on condition of receiving such allowances.<sup>7</sup> Such retiring allowance

<sup>1</sup> 1918 Act, s. 24 (2).

<sup>2</sup> 1908 Act, s. 21.

<sup>3</sup> 1872 Act, s. 55.

<sup>4</sup> 1918 Act, s. 6 (1) (c) and 27; *Smart v. Perthshire Education Authority*, 1927 S.C. (H.L.) 22.

<sup>5</sup> 1918 Act, s. 6 (2).

<sup>6</sup> *Coull v. Fife Education Authority*, 1925 S.C. 240.

<sup>7</sup> 1872 Act, s. 61, repealed Elementary School Teachers (Superannuation) Act, 1898 (61 & 62 Vict. c. 57), s. 12 (6), re-enacted 1908 Act, s. 12 (1); *School Board of Eckford v. Rutherford*, 1889, 16 R. 377; *Downie v. Renfrewshire Education Authority*, rep. in Scottish Educational Journal (O.H.), iii. 1003; rev. in Inner House, iv. 522; *Walker v. Ayrshire Education Authority*, rep. in Scottish Educational Journal (O.H.), viii. 1233; affd. in Inner House, ix. 83.

may include free use of the teacher's house and garden.<sup>1</sup> It is not necessary, in order to make a resolution to grant such a retiring allowance valid, that the teacher should have stipulated for such an allowance as a condition of his retiral.<sup>2</sup>

#### SUBSECTION (6).—*Non-public Schools.*

**210.** Teachers employed in schools not under an Education Authority may be employed subject to any conditions laid down in the charter or constitution of the school.<sup>3</sup> Otherwise the ordinary law of master and servant governs the conditions of their employment.<sup>4</sup> In the case of schools to the expense of the upkeep of which Education Authorities contribute, teachers must be paid salaries not less than those prescribed in the scheme of scales of salaries prepared by the Authority.<sup>5</sup>

#### SUBSECTION (7).—*Powers of Discipline.*

**211.** Teachers have the power of administering corporal punishment, subject to such regulations as may be laid down by the Authority or other governing body of the school. If, however, the punishment inflicted is excessive or cruel, the punishment, but only because of the excess, may become an assault rendering the teacher liable to criminal penalties,<sup>6</sup> or to civil damages.<sup>7</sup> A prohibition of corporal punishment by the Education Authority or other governing body will not in itself render a teacher liable to criminal penalties or civil damages if he acts in breach of the prohibition.<sup>8</sup> A teacher may inflict corporal punishment for an offence committed outside school.<sup>9</sup>

#### SUBSECTION (8).—*Transferred Teachers.*

**212.** Teachers who held office under a school board or secondary education committee at the transfer of the powers of these bodies to the Education Authorities<sup>10</sup> continue to hold their offices by the same

<sup>1</sup> *School Board of Eckford v. Rutherford*, 1889, 16 R. 377.

<sup>2</sup> *Campbell v. School Board of Muiravonside*, 1915, 1 S.L.T. 236.

<sup>3</sup> *Kempt v. Mags. of Irvine*, Mor. 13136 (n.d.); *A. B. v. Ayr Academy Directors*, 1825, 4 S. 63; *Murray v. Lindsay*, 1833, 11 S. 856; *Adam v. Inverness Academy Directors*, 1815, 14 S. 714 n.; *Gibson v. Tain Academy Directors*, 1837, 16 S. 301; affd. 1840, 1 Rob. App. 16; *Bell v. Mylne*, 1838, 16 S. 1136; affd. 1841, 2 Rob. App. 286; *Melvin v. Governors of Gordon's Hospital*, 1841, 4 D. 172; *A. B. v. C. D.*, 1844, 6 D. 1238; affd. *sub nom. Weir v. Crawford*, 1847, 6 Bell's App. 112; *Trs. of Woodside Institution v. Kiellar*, 1865, 4 M. 9; *Douglas's Trs. v. Milne*, 1884, 12 R. 141.

<sup>4</sup> *Mason v. Scott's Trs.*, 1836, 14 S. 343; *Melvin*, *supra*, per Lord Ivory at p. 176.

<sup>5</sup> See paras. 182 and 208, *supra*.

<sup>6</sup> *M'Shane v. Paton*, 1922, J.C. 26; *Brown v. Hilson*, 1924, J.C. 1; *Gardner v. Bygrave*, 1889, 6 T.L.R. 23.

<sup>7</sup> *Scorgie v. Laurie*, 1883, 10 R. 610; *Ewart v. Brown*, 1882, 10 R. 163; *Muckarsie v. Dickson*, 1848, 11 D. 4.

<sup>8</sup> *Mansell v. Griffin*, [1908] 1 K.B. 160.

<sup>9</sup> *Cleary v. Booth*, [1893] 1 Q.B. 465.

<sup>10</sup> 15th May 1919.

tenure and upon the same terms and conditions as before the transfer,<sup>1</sup> except as to method of dismissal.<sup>2</sup> While performing the same duties as before the transfer, they are entitled to salaries not less than they received or were entitled to before the transfer to the Authorities.

### SECTION 11.—FEEDING AND MEDICAL SUPERVISION OF SCHOOL CHILDREN.

**213.** Education Authorities have special duties laid on them to provide for the feeding of children and for their medical examination and supervision.

#### SUBSECTION (1).—*Nursery Schools.*

**214.** An Education Authority may make arrangements for supplying, or aiding the supply of, nursery schools for children over two and under five (or such later age as may be approved by the Department) whose attendance at such a school is necessary or desirable for their healthy physical and mental development; and for attending to the health, nourishment, and physical welfare of children attending nursery schools.<sup>3</sup>

#### SUBSECTION (2).—*Infected Children.*

**215.** A parent<sup>4</sup> or person who has charge of a child who is or has been suffering from infectious disease, or who resides in a house where such disease exists or has existed within a period of three months, who shall knowingly or negligently permit such child to attend school without procuring and producing to the teacher or other person in charge of such school a certificate from a qualified medical practitioner that proper precautions against disease and infection have been taken, and that such child may attend school without the risk of infecting others, shall be liable to a penalty not exceeding forty shillings. Any teacher or person in charge of a school who shall knowingly permit any child to attend such school in contravention of these provisions shall be liable to the same penalty.<sup>5</sup>

#### SUBSECTION (3).—*Neglected Children.*

**216.** When it is brought to the notice of the Education Authority, as the result of medical examination or otherwise, that a child is attending a school in their area in a filthy or verminous condition, or is unable by reason of lack of food or clothing to take full advantage of the educa-

<sup>1</sup> 1918 Act, Sched. IV. s. 8; *Kelly v. Glasgow Education Authority*, 1928, S.N. 25; cf. para. 172, *supra*. The last teacher entitled to the corresponding privileges of s. 55 of the Act of 1872 retired in April 1924.

<sup>2</sup> See para. 206, *supra*.

<sup>3</sup> 1918 Act, s. 8; see Strong on Education (Scotland) Act, 1918, p. 17.

<sup>4</sup> 1872 Act, s. 1.

<sup>5</sup> Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 57, as amended Public Health (Scotland) Amendment Act, 1907 (7 Edw. VII. c. 30), s. 1.



tion provided, it is the duty of the Authority (or school management committee) after due warning, to summon either or both of the parents <sup>1</sup> of such child to appear before them to give an explanation of the child's condition. If no explanation, or an insufficient or unsatisfactory explanation, is given, and it appears that the condition of the child is due to neglect, the Authority shall transmit a copy of their finding to the parents <sup>1</sup> and to the Procurator-Fiscal who is bound to institute a prosecution of the parent for cruelty to the child. During this procedure the Authority may, where they deem it necessary owing to the condition of the child, make temporary provision for the child out of the education fund, and may recover the cost of such provision from the parent <sup>1</sup> as an alimentary debt, unless it be shewn to the satisfaction of the Authority that the parent was unable by reason of poverty or ill-health to supply sufficient and proper food or clothing for the child, or to give the child the necessary personal attention. If it be shewn to the satisfaction of the Authority or, in the event of a prosecution, of the Sheriff, that the parent is unable by reason of poverty or ill-health to provide sufficient and proper food or clothing for the child, or to give it the necessary personal attention, the Authority, if satisfied that the necessities of the case will not be provided for by voluntary agency, must make such provision for the child out of the education fund as they deem necessary, during such period while the child is under obligation to attend school as they may determine.<sup>2</sup>

**217.** An alternative method of dealing with verminous or filthy children is available. The Authority may direct their medical officer, or any person authorised by him in writing, to examine the person or clothing of any child in a public school. In the case of girls the examiner must be a medical practitioner or a woman. If the examiner is of opinion that the person or clothing of the child is infected with vermin or is in a foul or filthy condition, the Authority may give notice in writing to the parent <sup>1</sup> requiring him to cleanse properly the person and clothing of the child within twenty-four hours after receipt of the notice. The Authority shall at the same time give the parent <sup>1</sup> written instructions describing the manner in which the cleansing may be best effected. If the parent to whom notice is given fails to comply therewith within twenty-four hours, the medical officer, or other person authorised in writing by him, may remove the child referred to in the notice from school, and cause the person and clothing of the child to be cleansed in suitable premises and with suitable apparatus, and may detain the child in such premises until the cleansing is effected. If the parent of a child so cleansed by the Authority allows him to get into such a condition that it is again necessary to take these proceedings, the parent is liable on summary conviction to a fine not exceeding ten shillings.<sup>3</sup>

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<sup>1</sup> 1872 Act, s. 1.

<sup>2</sup> 1908 Act, s. 6.

<sup>3</sup> Children Act, 1908 (8 Edw. VII. c. 67), s. 122.



SUBSECTION (4).—*Medical Examination.*

**218.** An Education Authority may, and where required by the Department shall, provide for the medical examination and supervision of the children attending schools within their district to such extent and subject to such requirements as may from time to time be prescribed by the Department. For these purposes the Authority may employ medical officers or nurses, or arrange with voluntary agencies for the supply of nurses, and provide appliances or other requisites.<sup>1</sup> An Authority has the same powers to provide medical (including surgical and dental) treatment for a child as they have with reference to the provision of proper food and clothing.<sup>2</sup> Their powers and duties also extend to young persons who are under obligation to attend continuation classes.<sup>3</sup>

**219.** Managers of schools which are not public schools but which are in receipt of grants, if they do not themselves provide to the satisfaction of the Department for the medical examination of the pupils in such school, must give full facilities to the medical officers and nurses of the Authority to make examination of the pupils.<sup>1</sup> The medical officer of the Local Public Health Authority may enter any school <sup>4</sup> in his district between the hours of 9 a.m. and 6 p.m. if he has reason to believe there is infectious disease, and may examine the children. If necessary he may obtain judicial warrant to do so.<sup>5</sup> If the medical officer certifies that the disinfection of a school would tend to prevent the spread of disease, and the school managers do not disinfect it, the Public Health Authority may do so.<sup>6</sup>

SUBSECTION (5).—*Feeding of School Children.*

**220.** Education Authorities have power to provide accommodation, apparatus, equipment, and service for the preparation and supply of meals to pupils attending school within their area.<sup>7</sup> The exercise of this power is not limited to children attending public schools.<sup>8</sup> The expense incurred in the purchase of food prepared and served at such meals may not be met out of the education fund,<sup>7</sup> except in the case of children whose parents are unable by reason of poverty or ill-health to provide proper and sufficient food.<sup>9</sup> Meals may be provided on any day, whether a school day or not.<sup>10</sup>

SUBSECTION (6).—*Blind and Deaf-mute Children.*

**221.** A parent is obliged to provide for the education of a blind or deaf-mute child between the ages of five and eighteen, and such infirmity

<sup>1</sup> 1908 Act, s. 4.<sup>2</sup> 1913 Act, s. 3. See para. 216, *supra*.<sup>3</sup> 1918 Act, s. 15 (13); see para. 227, *infra*.<sup>4</sup> Public Health (Scotland) Act, 1897 (60 & 61 Vict. c. 38), s. 3.<sup>5</sup> *Ibid.*, s. 45.<sup>6</sup> *Ibid.*, s. 47.<sup>7</sup> 1908 Act, s. 3 (2).<sup>8</sup> Graham's Manual of the Education Acts, p. 170.<sup>9</sup> 1908 Act, ss. 3 (2) and 6, proviso.<sup>10</sup> Education (Scotland) (Provision of Meals) Act, 1914 (4 & 5 Geo. V. c. 68), s. 1.

is not of itself reasonable excuse for the non-attendance of such a child at school.<sup>1</sup> If the parent is unable from poverty to provide proper education, it is the duty of the Education Authority to provide for the child's education in reading, writing, and arithmetic, and for his industrial training, either in a school belonging to the Authority, or in some other school or institution approved by the Department, and where necessary the Authority shall be bound to provide for the boarding of the child at some place approved by the Authority, and for the transit of the child to and from such school, institution, or place.<sup>2</sup> An Education Authority may also, from time to time, with the consent of the Department, contribute to the establishment, building, and managing of a school for blind and deaf-mute children, and to the support of the inmates thereof.<sup>3</sup> In performance of its duty to blind and deaf-mute children the Authority shall have regard to the religious persuasion of the child. The school attended, if not a public school, must be one conducted in accordance with the same religious persuasion. If the child is boarded out, the person with whom he is boarded must be of the same religious persuasion. A child shall not be compelled to receive religious instruction contrary to the wishes of the parent.<sup>4</sup> Payments in respect of such a child shall not be made conditional on the child attending any school or institution other than such as may be reasonably selected by the parent, nor refused because the child attends or does not attend any particular school or institution.<sup>5</sup>

SUBSECTION (7).—*Epileptic, Crippled, and Defective Children.*

**222.** An Education Authority may, either alone or in combination with one or more Education Authorities, make special provision for the education, medical inspection, and, where required, for the conveyance to and from school, or for the maintenance in homes or institutions, of epileptic, or crippled, or defective children between the ages of five and sixteen, and defray the cost thereof out of the education fund. "Epileptic children" means children who, not being idiots or imbeciles, are unfit by reason of severe epilepsy to attend the ordinary schools. "Defective children" means children who, not being imbecile, and not being merely dull or backward, are, by reason of mental or physical defect, incapable of receiving proper benefit from the instruction in the ordinary schools.<sup>6</sup>

SUBSECTION (8).—*Mentally Defective Children.*

**223.** Mentally defective children include idiots, imbeciles, feeble-minded children, and moral imbeciles. Idiots are persons so deeply defective in mind from birth or from an early age as to be unable to guard themselves against common physical dangers. Imbeciles are

<sup>1</sup> Blind and Deaf-mute Children (Scotland) Act, 1890 (53 & 54 Vict. c. 43), ss. 3 and 5, as amended 1918 Act, Sched. V. s. 3.

<sup>2</sup> *Ibid.*, s. 3.

<sup>3</sup> *Ibid.*, s. 4.

<sup>4</sup> *Ibid.*, s. 6.

<sup>5</sup> *Ibid.*, s. 7.

<sup>6</sup> Education of Defective Children (Scotland) Act, 1906 (6 Edw. VII. c. 10); 1908 Act, s. 3 (4); 1918 Act, Sched. VI.; 1925 Act, s. 5.

children in whose case there exists from birth or from an early age mental defectiveness not amounting to idiocy, yet so pronounced that they are incapable of being taught to manage themselves or their affairs. Feeble-minded children are children in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools. Moral imbeciles are children who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities, on which punishment has had little or no deterrent effect.<sup>1</sup> It is the duty of the parent or guardian of such defective children between the ages of five and sixteen to make provision for the education or for the proper care and supervision of such children as the case may require. If the parent or guardian is unable to do so because of the attendant expense, it is the duty of the Education Authority to make suitable provision for the child.<sup>2</sup>

**224.** It is the duty of the Education Authority to make arrangements, subject to the approval of the Department, for ascertaining (1) what children within their area are defectives within the meaning of the Act, and (2) which of such children are incapable by reason of mental defect of receiving benefit or further benefit from instruction in special schools or classes, or of receiving such instruction without detriment to the interests of the other children, and for notifying to the parish council and the General Board of Control<sup>3</sup> the names and addresses of such children.<sup>4</sup> The duties in regard to such children as are so notified pass to the parish council.<sup>5</sup> In case of doubt as to whether a child should be included in the class required to be notified, the matter shall be determined by the Department.<sup>6</sup>

## SECTION 12.—SECONDARY SCHOOLS.

**225.** A secondary school means a school, or a department of a school, recognised by the Department as providing at least a five years' course of instruction in languages, mathematics, science, and such other subjects as may from time to time be deemed suitable for the instruction of pupils who have reached the stage of attainment in elementary subjects indicated in the Department's Code of Regulations for day schools.<sup>7</sup> Wide powers are given to Education Authorities to assist children likely to profit by such instruction to attend such schools, by payment of cost of travelling, of fees, of residence in hostels, or by bursaries or maintenance allowances.<sup>8</sup> The scheme for the provision of education within their area which an Education Authority must prepare includes all forms of secondary education.<sup>9</sup>

<sup>1</sup> Mental Deficiency and Lunacy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 38), s. 1.

<sup>2</sup> Sec. 2 (1).

<sup>3</sup> Sec. 19.

<sup>4</sup> Sec. 2 (2).

<sup>5</sup> Sec. 2 (4).

<sup>6</sup> Sec. 2 (3).

<sup>7</sup> 1908 Act, s. 34.

<sup>8</sup> 1918 Act, s. 4.

<sup>9</sup> 1918 Act, s. 6 (1) (a).



## SECTION 13.—TECHNICAL SCHOOLS.

**226.** An Authority may, with the approval of the Department, establish technical schools, or a technical department in a school, in which instruction is given in the branches of science and art for which grants are given by the Department, or in any other subject approved by the Department.<sup>1</sup>

## SECTION 14.—CONTINUATION CLASSES.

**227.** It is the duty of the Education Authority in each area to provide classes for the further instruction of pupils who have left school. These classes must provide, in accordance with regulations to be laid down by the Department, for instruction in English language and literature, and the laws of health, and for instruction in the domestic arts, and the crafts and industries of the district. Provision is to be made for physical training, and in Gaelic speaking districts provision may be made for instruction in Gaelic.<sup>2</sup> A wide extension of this duty, and of the instruction to be given, and provision for compulsory attendance is made by the Act of 1918,<sup>3</sup> but these provisions have not yet been put into force.

## SECTION 15.—INDUSTRIAL SCHOOLS AND REFORMATORIES.

**228.** These are now regulated by the Children Act, 1908.<sup>4</sup> A reformatory school is a school for the industrial training of youthful offenders, in which youthful offenders are lodged, clothed, and fed, as well as taught (s. 44 (1)). An industrial school is a school for the industrial training of children, in which children are lodged, clothed, and fed as well as taught (*ibid.*). A day industrial school is a school for the industrial training of children, in which industrial training, education, and one or more meals a day are given (s. 77 (1)), and is a public or inspected school (s. 77 (2)). A school may not at the same time be a day industrial school and a reformatory or industrial school (s. 77 (3)).

**229.** When a youthful offender is, in the opinion of the Court, between twelve and sixteen years of age, and is convicted of an offence punishable in the case of an adult with penal servitude or imprisonment, the Court may order him to be sent to a reformatory school (s. 57). Any person may bring before a Court of summary jurisdiction any person apparently under the age of fourteen found begging, or wandering, or destitute, or under the care of a parent unfit from crime or drunkenness to have the care of a child, or frequenting the company of thieves or prostitutes, or lodging in a house used for prostitution, and the Court may order the child to be sent to an industrial school (s. 58 (1)). When a child apparently under the age of twelve is charged with an offence,

<sup>1</sup> Technical Schools (Scotland) Act, 1887 (50 & 51 Vict. c. 64).

<sup>2</sup> 1908 Act, s. 10.

<sup>3</sup> 1918 Act, s. 15.

<sup>4</sup> 8 Edw. VII. c. 67.



he may be sent to an industrial school, and if he is apparently twelve or thirteen he may, if the Court think he should not be sent to a reformatory, be sent to an industrial school (s. 58 (3)).

**230.** If a parent or guardian proves that he is unable to control his child, and that he desires it should be sent to an industrial school, the child may be so sent, unless the Court think it better to place him under the supervision of a probation officer, as if he had been charged with an offence under the Probation of Offenders Act, 1907 (s. 58 (4)). Where under s. 58 the Court is empowered to order a child to be sent to an industrial school, the Court may, instead of doing so, make an order for his committal to the care of a relative or other fit person (s. 58 (7)). It is the duty of the standing joint committee of the county, and, in a burgh, of the town council, to take proceedings for sending a child to an industrial school, under subs. (1) of s. 58, unless the Education Authority do so (s. 58 (8)). A person of fourteen or fifteen, so circumstanced that if he were a child he would come under one of the descriptions mentioned in subs. (1) of s. 58, may be brought before a Court, and may be committed to the care of a relative or other fit person (s. 59). He may also be placed under the supervision of a probation officer (s. 60). If it is impossible to specify at the time the school to which the child is to be sent, that may be done afterwards by a justice having jurisdiction in the place where the Court which made the order of detention sat (s. 62). The detention order shall specify the period for which the child is to be detained, being in the case of a reformatory not less than three nor more than five years, and not extending beyond the age of nineteen, and in the case of an industrial school, such period as the Court may think proper, but not extending beyond the age of sixteen (s. 65). The Court must endeavour to send the child to a school conducted in accordance with the religious persuasion of its parent (s. 66).

**231.** The managers of a school where a child is detained may, after eighteen months, by licence permit the child to live with any respectable person. If the licence has been revoked and the child fails to return, and if there is reasonable ground for believing that the parent could produce the child if he liked, the Court may summon the parent and may fine him (s. 67). A child shall, in the case of a reformatory, remain "under the supervision" of the managers up to nineteen, and in the case of an industrial school, up to eighteen, although the period of his detention has expired (s. 68). The Secretary of State for Scotland may order a child to be discharged from a reformatory or industrial school, or to be transferred from one school to another (s. 69). If a child conducts himself well, the managers of the school may, with his own consent, apprentice him to, or dispose of him in, any trade or calling, including the navy or army, or by emigration (s. 70).

**232.** Provision is made for the punishment of children in reformatories or industrial schools who break the rules, or who attempt to escape (ss. 71, 72). In the case of reformatories the offender may have his period of detention increased, and if over sixteen he may be im-

prisoned, or he may be sent to a Borstal institution.<sup>1</sup> In the case of industrial schools the offender may, if over twelve, be sent to a reformatory. The expense of bringing the child back shall be borne by the school from which he escaped. Anyone assisting a child to escape may be punished.

**233.** The Treasury shall contribute towards the expenses of a child in a reformatory or industrial school, but not more than two shillings per head per week for children detained in an industrial school on the application of their parents (s. 73). In the case of a reformatory it is the duty of the county council, or of the burgh or police burgh within the meaning of the Local Government (Scotland) Act, 1889,<sup>2</sup> in which the child resides, to provide for his reception and maintenance in a reformatory (s. 74 (1)). In the case of an industrial school it is the duty of the Education Authority of the area in which the child resides to provide for his reception and maintenance in an industrial school, but not if the child is sent at the desire of his parent, or at the instance of the parish council, or if the child has no settled place of abode, or if no contribution is paid for it by the Treasury (s. 74 (2) and (5)). The Education Authority are entitled to be heard before a child is sent to an industrial school at their expense (s. 74 (6)). For the purpose of the performance of their duties under this part of the Act, county councils, burgh councils, and Education Authorities may contract with the managers of a reformatory or industrial school for the reception of children therein, or may themselves establish or contribute to such schools (s. 74 (8)). If a child is sent to an industrial school at the instance of the parish council, they shall contribute towards his maintenance (s. 74 (11)). The parent or other person liable to maintain a child sent to a reformatory or industrial school shall contribute to its maintenance therein (s. 75).

**234.** Any child who may be sent to an industrial school may be sent to a day industrial school, and may be detained there during such hours as the Secretary of State for Scotland may approve (s. 78). A child may be received into a day industrial school on the request of an Education Authority and of the parent, the parent undertaking to contribute to the expense of its industrial training and meals (s. 79). The Treasury shall contribute to the expense of children sent to a day industrial school (s. 80). Education Authorities have power to pay for children in day industrial schools, and to establish or contribute to such schools, but they are not bound to provide for the reception and maintenance of a child in a day industrial school, as they are bound to do in the case of an industrial school (ss. 74, 81). If they have not established a day industrial school in their own district, it is impossible for them to provide for the child in such a school in another place, because it cannot be lodged there. When a Court orders a child to be sent to a day industrial school, it shall also order the parent to contribute to industrial training and meals therein. This shall be enforced

<sup>1</sup> Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), ss. 2, 4, 9, 17.

<sup>2</sup> 52 & 53 Vict. c. 50, ss. 3 and 105.

by the Education Authority, and the money shall go to the education fund (s. 82).

**235.** If a youthful offender has been sentenced to imprisonment or penal servitude and has been pardoned, he may, if under sixteen, be sent to a reformatory, but not for a period extending beyond the time when he shall attain the age of nineteen (s. 84). Every officer authorised by the managers of a school to take charge of a child ordered to be detained at school shall have the powers of a constable. The Act applies to any reformatory or industrial school established under any local Act, with some slight modifications (s. 90). The Act is not to affect the Glasgow Juvenile Delinquency Prevention and Repression Acts, 1878 and 1896; nor the Aberdeen Reformatories and Industrial Schools Acts, 1885, except in a few minor points (s. 132 (24), (25)). Where application is made to send a child to an industrial school, his parent or guardian is required to attend at Court (s. 98).

#### SECTION 16.—FINANCE.

**236.** The expenses of the Scottish Education Department are defrayed out of moneys voted by Parliament.<sup>1</sup> The Department administer the Education (Scotland) Fund,<sup>2</sup> to which are paid (1) certain sums payable out of the Local Taxation (Scotland) Account,<sup>3</sup> (2) a sum equal to the amount of the sums applicable to education in Scotland (other than the Royal Scottish Museum grant, the capital grant for the training of teachers, sums spent on the superannuation of teachers, and the expenses of the Department) shewn by the appropriation account to have been expended from the parliamentary vote for education in Scotland in the year ended 31st March 1914, and (3) eleven-eightieths of the excess of the amount of the sums estimated to be expended in each year from the vote for education in England and Wales (except so far as such sums represent expenses of general departmental administration, or sums spent on the superannuation of teachers, or expenses of services for which, in the opinion of the Treasury after consultation with the Department, Scotland already receives an equivalent by way of direct contribution or of common benefit) over the amount of the sums shewn by the appropriation account to have been so expended in the year ending 31st March 1914. If the actual sum paid in England and Wales varies from the estimated amount, an addition or reduction of eleven-eightieths of the difference is made on the payment to Scotland in the following year.<sup>4</sup>

**237.** The Education (Scotland) Fund is applied to the following purposes: (a) providing for the expenses of inspecting and examining secondary schools, and of conducting the leaving certificate examinations; (b) making grants to the universities; (c) making grants to certain central institutions; <sup>5</sup> (d) making payments to provincial

<sup>1</sup> 1872 Act, ss. 2 and 50.

<sup>2</sup> 1908 Act, s. 15.

<sup>3</sup> *Ibid.*, s. 15 (1) to (5).

<sup>4</sup> 1918 Act, s. 21 (1).

<sup>5</sup> See 1908 Act, Sched. II.



committees; (e) making grants in aid of superannuation of teachers; (f) providing for other educational expenditure approved by the Department set forth in minutes which have lain on the table of both Houses of Parliament for not less than one month.<sup>1</sup> The balance that may remain in any year is applied in making grants in aid of the expenditure of Education Authorities and managers of schools in accordance with minutes of the Department laid before Parliament, and on the table of both Houses of Parliament for not less than one month.<sup>2</sup>

**238.** The expense of education in public schools—including contributions by Education Authorities to schools and other institutions not under their own management<sup>3</sup>—is paid out of the education fund of the education area.<sup>4</sup> To this fund are carried all money received as grants from the Department, or money raised by loan, and money received otherwise by the Authority, or transferred to the Authority in 1918, for the purposes of that fund, and not specially appropriated. The deficiency in the fund shall be ascertained annually, apportioned among the parishes in the area, and raised as “education rate” by the parish council. The amount raised as education rate is paid thereafter by the parish council to the Education Authority without any deduction for the expense of collection.<sup>5</sup> Any surplus of education rate which may arise in any one year shall be applied for the purposes of the ensuing year, and any deficiency which may occur in any year shall in like manner be included in the rate for the ensuing year.<sup>6</sup>

**239.** The Authority must appoint a treasurer.<sup>7</sup> The accounts of the Authority are made up annually as at 15th May in a form prescribed by the Department, and are audited by the Department.<sup>8</sup>

## PART II.—UNIVERSITIES.

### SECTION 1.—HISTORICAL.

**240.** In Scotland there are four Universities: St. Andrews, founded in 1411 by the Spanish anti-Pope Benedict XIII., at the instance of Bishop Wardlaw; Glasgow, founded in 1450 by Bishop Turnbull, under a Bull of Pope Nicholas V.; Aberdeen, founded in 1494 by Bishop Elphinstone, under a Bull obtained from Pope Alexander VI. at the instance of King James IV.; Edinburgh, founded in 1582 by King James VI., at the instance of the Town Council of the capital, under a charter which was confirmed by Act of Parliament in 1621. St. Andrews alone consisted of more than one college: St. Mary’s and the United College of St. Salvator and St. Leonard remain of the older foundations, while the recently established University College, Dundee, is now a part of the University. At Aberdeen, in addition to Bishop Elphinstone’s foundation, there was an independent degree-granting institution

<sup>1</sup> 1908 Act, s. 16.

<sup>2</sup> 1918 Act, s. 21.

<sup>3</sup> *Ibid.*, s. 9.

<sup>4</sup> *Ibid.*, s. 13 (1).

<sup>5</sup> *Ibid.*, s. 13 (2).

<sup>6</sup> *Ibid.*, s. 13 (4).

<sup>7</sup> 1872 Act, s. 48.

<sup>8</sup> 1908 Act, s. 23.



founded in 1593 by the Earl Marischall. By the Act of 1858,<sup>1</sup> however, the two Universities were conjoined. All of these institutions claimed the right of granting degrees in the four Faculties of Philosophy, Medicine, Law, and Divinity. Marischall College in Aberdeen, however, confined itself for the most part to Philosophy or Arts and Medicine, while the older Aberdeen University, which consisted of King's College only, gave degrees mainly in Arts and Divinity.

**241.** The Scottish Universities were modelled on the older institutions of the Continent. St. Andrews and Aberdeen were intended to consist of colleges of learned men, and were not purely educational foundations; Glasgow, on the other hand, was expressly an imitation of Bologna, where the students were practically the governing element, and the manufacture of scholars was deemed of more importance than the pursuit of scholarship. The University of Edinburgh was intended by its practical post-Reformation founders to be purely educational, and in its beginnings was little more than a superior grammar school. Its advance to its present position as one of the largest and most successful centres of scientific education is specially remarkable. The Scottish Universities remained as they had been constituted up to the end of the eighteenth century. The position of the Theological Faculties had been finally regulated at the Revolution, while the 25th Article of the Act of Union of 1706<sup>2</sup> preserved the Presbyterian control of the Universities and guaranteed their continuance "for ever."

**242.** During the eighteenth century the Universities shared in the distress and stagnation which fell upon Scotland—a distress specially aggravated during three periods of the century: that succeeding the Union, the years following "the Fifteen," and the most disastrous time after "the Forty-five." Not till the revival of prosperity, which began in the latter half of the century and has continued in almost unbroken progression, did the Universities begin to increase in either wealth or size. Early in the nineteenth century the condition of the Universities attracted the attention of statesmen, and during nearly the whole century Royal Commissions were appointed at almost regular intervals. Of these, however, only two were executive. Mention may be made of the non-executive Royal Commissions appointed in 1826, 1836, 1845, and in 1857. In 1858 the first great change in the constitution of the Universities was effected by the Universities (Scotland) Act.<sup>1</sup> Under this Act an Executive Commission was appointed, which framed a body of ordinances regulating the constitutions of the Universities, the course of study in each Faculty, and the powers, duties, and privileges of the members of the Universities. In 1876 a further Commission of inquiry was appointed; by it a large body of valuable evidence was gathered. In 1889 the second Universities (Scotland) Act was passed.<sup>3</sup> An Executive Commission was appointed by the 1889 Act, and the present constitutions of the Universities are practically the result of its

<sup>1</sup> 21 & 22 Vict. c. 83.

<sup>2</sup> 1706, c. 7.

<sup>3</sup> 52 & 53 Vict. c. 55.

provisions and of the ordinances of the Commissioners acting under it—except in so far as the provisions of the Act of 1858 and the ordinances of its Commissioners remain unrepealed or unmodified.

### SECTION 2.—CONSTITUTION.

#### SUBSECTION (1).—*Chancellor.*

**243.** In each University the office of highest honour is that of the Chancellor. He is appointed by the whole body of graduates. When present he presides at meetings of the General Council. He is not a member of any other academic body, but he nominates an Assessor to the University Court.<sup>1</sup>

#### SUBSECTION (2).—*Rector.*

**244.** The Scottish students retain the ancient right, lost by the students of all other European Universities, of electing their Rector. The Rector is chairman *ex officio* of the University Court, and also nominates an Assessor to that body.<sup>2</sup>

#### SUBSECTION (3).—*Vice-Chancellor*<sup>1</sup> *and Principal.*

**245.** The title of Principal historically belongs rather to the head of a college of a University than to the resident head of the University itself. Except St. Andrews, however, the Scottish Universities always have consisted of a single *collegium*, and the title and office have grown in importance as the Universities have increased in size and wealth. In St. Andrews there are now three Principals, viz. the Principal of the United College of St. Salvator and St. Leonard, who is also *ex officio* Principal and Vice-Chancellor of the University; the Principal of St. Mary's College, who is also Primarius Professor of Divinity; and, third, the Principal of University College, Dundee. All three are *ex officiis* members of the University Court. In each of the other Universities the Principal, who is always also Vice-Chancellor, is a member of the University Court. The Principal is also a member and chairman of the *Senatus Academicus*.

#### SUBSECTION (4).—*University Court.*

**246.** The University Court was created by the Act of 1858,<sup>3</sup> to be the supreme governing body in each University. The Act of 1889<sup>4</sup> increased the number of members of each Court and laid many new duties upon them. The Court is a body corporate, with perpetual succession and a common seal, and has now entire control of the financial arrangements of the University, subject to the provisions laid down by the Commissioners under the Act of 1889 in their ordinances.<sup>5</sup> The

<sup>1</sup> 1858 Act, s. 2.

<sup>4</sup> Secs. 5 and 6.

<sup>2</sup> *Ibid.*, ss. 8–11; 1889 Act, s. 5 (2).

<sup>5</sup> Nos. 4, 25, 26, 27, 46, and 137.

<sup>3</sup> Secs. 4 and 8–13.

Court has in each University the right of appointing the Professors to certain of the chairs.<sup>1</sup> Appeals may be made from the *Senatus Academicus* to the Court.<sup>2</sup> The University Court elects the representative of the University on the General Medical Council under the Medical Act, 1886. In the event of colleges being affiliated to a University, such affiliated college may be directly represented on the Court of the University, but in no University can the number of representatives of affiliated colleges exceed four.<sup>3</sup>

247. The University Court of each University has power to make such ordinances as it sees fit, with the approval of His Majesty in Council. Draft ordinances must be submitted to the *Senatus Academicus* and the General Council, whose opinion thereon, if returned to the University Court within one month, must be taken into consideration. Draft ordinances must also be communicated to the University Courts of the other Universities, and such other University Court or any person directly affected may represent against the draft ordinance within one month to His Majesty in Council. The draft and objections may be referred to the Scottish Universities Committee of the Privy Council.<sup>4</sup> No ordinance is valid until it has been approved by His Majesty in Council and has been laid before Parliament.<sup>5</sup>

#### SUBSECTION (5).—*Senatus Academicus*.

248. The *Senatus Academicus* consists of the whole of the Professors in each University and a limited number of Readers or Senior Lecturers. From the earliest times, in the case of St. Andrews, Glasgow, and Aberdeen, the *Senatus Academicus* had practically entire control of the whole management of the University, including its finances. In the case of Edinburgh this management was subject to the control of the Town Council. In 1858 the Edinburgh *Senatus* was freed from what had for long been a cause of friction, irritation, and litigation,<sup>6</sup> and from that date until 1889 the University of Edinburgh was managed by its *Senatus*. In that year, however, the Court in each University, as has been stated, was given many of the powers and duties formerly exercised and performed by the *Senatus*. Now the *Senatus* has (subject to appeal to the Court) the entire management of the whole educational arrangements of the University and of discipline therein.<sup>7</sup> In St. Andrews it appoints three members of the Court, in Glasgow four, in Aberdeen four, and in Edinburgh four. The *Senatus* has the right of appointing two-thirds of the members of committees which in each University have the custody of the libraries and museums. The other members are appointed by the Court, and may not be members of the *Senatus Academicus*.<sup>8</sup>

<sup>1</sup> 1858 Act, s. 13; 1889 Act, s. 6 (4).

<sup>2</sup> *Ibid.*, s. 5 (1).

<sup>3</sup> *Ibid.*, s. 9.

<sup>4</sup> See Grant's Story of the University of Edinburgh.

<sup>5</sup> 1889 Act, s. 7 (1).

<sup>6</sup> 1889 Act, s. 6 (2), (3).

<sup>7</sup> *Ibid.*, s. 21.

<sup>8</sup> *Ibid.*, s. 7 (2).



**249.** The Principal and Professors formerly held their offices *ad vitam aut culpam*. Gradually, in the case of the institution of new chairs, and in new appointments to existing chairs, a custom grew up of imposing an age limit on the tenure of the chair by a clause inserted in the Professor's commission. By ordinance of the University Courts passed in 1922, appointments after that date are subject to an age limit. The ages are: for the Principal in St. Andrews and Edinburgh, 75, and in Glasgow, 70; for Professors in St. Andrews and Edinburgh, 70, and in Glasgow, 65. Aberdeen has not yet fixed age limits by ordinance. Principals and professors appointed prior to 26th July 1924 are entitled to pensions under Ordinance 32 of the Commissioners under the Act of 1889. Those appointed after that date are entitled to pensions under the Federated Superannuation System for Universities.<sup>1</sup>

#### SUBSECTION (6).—*General Council.*

**250.** In each University the whole body of graduates compose the General Council. This body was created by the Act of 1858.<sup>2</sup> Its powers are not executive. It meets twice a year on appointed dates, but the meetings may be adjourned and special meetings may be summoned by the Chancellor on a requisition by a quorum of the Council.<sup>3</sup> The Commissioners under the Act of 1889 have fixed the quorum in the case of each University at ten for every complete thousand or fraction of a thousand on the register of members of the General Council. The General Council, as stated, elects the Chancellor. The Councils of the four Universities together return three members to Parliament.

#### SUBSECTION (7).—*Students' Representative Council.*

**251.** In each University there exists a Students' Representative Council.<sup>4</sup> The constitution of this body is approved by the University Court, and no alteration in the constitution can be made without the authority of the Court. The function of the Representative Council is to act as a means of recognised communication between the students and the University authorities, and to organise the students and regulate their proceedings on public occasions.

#### SUBSECTION (8).—*Lecturers and Assistants.*

**252.** University Lecturers are appointed by the University Court for such periods, not exceeding five years, and at such salaries as the Court may determine. The appointment is renewable at the end of that time, and usually is renewed. Lecturers and assistants receive pensions from the Federated Superannuation System. Lecturers of standing may be appointed by the Senatus as "Readers," or in the Faculty of Medicine

<sup>1</sup> Third Report of the Advisory Committee of the Board of Education on University Grants. Cd. 6869.

<sup>2</sup> Sec. 6.

<sup>4</sup> 1889 Act, s. 3.

<sup>3</sup> *Id.*, s. 8.



as "Senior Lecturers." They may thereafter be appointed as members of their respective Faculties, and a limited number may be appointed members of the Senatus.

#### SUBSECTION (9).—*Students.*

**253.** Students who do not propose to study for a degree become members of the University by the act of matriculation. Those who wish to proceed to a degree must fulfil the conditions as to preliminary education or examination laid down by the Scottish Universities' Entrance Board, which is representative of the four Universities.

#### SECTION 3.—GRADUATION.

**254.** Each University admits to graduation in Arts (M.A., B.Ed., B.Litt.,<sup>1</sup> B.Phil.,<sup>1</sup> B.Com.,<sup>2</sup> Ph.D., D.Sc., and D.Litt.), Law<sup>3</sup> (B.L., LL.B., Ph.D.), Medicine (M.B., Ch.B., Ph.D., Ch.M., M.D.), Science (B.Sc., Ph.D., D.Sc.), and Divinity (B.D. Ph.D.). In Edinburgh degrees are also granted in Music (Mus.B., Ph.D., Mus.D.). In Law the degree of LL.D., and in Divinity the degree of D.D., are granted *honoris causa tantum*. The degree of Mus.D. is granted by Edinburgh either after the prescribed tests or *honoris causa*.

#### SECTION 4.—EXTRA-MURAL LECTURERS.

**255.** One special feature of the Scottish Universities remains to be noted. The University Courts have power to recognise as qualifying for graduation the teaching of lecturers in Divinity, Medicine, and Science who are not otherwise connected with the University. In the University of Edinburgh, in especial, great advantage has been taken of this arrangement, and an important auxiliary medical school has been built up outside the University walls. Students of Medicine and Science, however, are not allowed to take the whole of their course of study under extra-mural teachers. Two of the five years of their course of study must be spent in attendance on the classes of the teachers within the University in which the candidate desires to graduate, and similar regulations apply to students of Science. In Divinity, however, a graduate in Arts may proceed to the degree of B.D. in the University of which he is already a member, even if the whole of his Divinity course has been taken in a denominational theological college "recognised for the purpose" by the University Court (*vide* Ordinance 63).

#### SECTION 5.—LECTURES.

**256.** A professor in a University is entitled to interdict the publication of his lectures without his sanction.<sup>4</sup>

<sup>1</sup> St. Andrews only.

<sup>3</sup> Except St. Andrews.

<sup>2</sup> Except Glasgow.

<sup>4</sup> *Caird v. Sime*, 1887, 14 R. (H.L.) 37.

## PART III.—EDUCATIONAL ENDOWMENTS.

SECTION 1.—EDUCATIONAL ENDOWMENTS (SCOTLAND) ACT, 1882.<sup>1</sup>

**257.** The purpose of this Act, as set forth in its preamble, was “to extend the usefulness of educational endowments in Scotland, and to carry out more fully than is done at present the spirit of the founder’s intentions, and, so far as may be, to make an adequate portion of such endowments available for affording to boys and girls of promise opportunities for obtaining higher education of the kind best suited to aid their advancement in life.” Educational endowments are defined <sup>2</sup> as “any property, heritable or moveable, dedicated to charitable uses, and which has been applied, or is applicable, in whole or in part, whether by the declared intention of the founder, or the consent of the governing body, or by custom or otherwise, to educational purposes, but shall not, except with the consent of the governing body, include the funds, whether capital or revenue, of any incorporation or society, contributed or paid by the members of such incorporation or society by way of entry moneys or other fixed or stated payments, nor burgess fines paid to any such incorporation or corporate society, except as hereinafter provided.”

**258.** The Act provided for the appointment of seven Commissioners, and gave them power to prepare drafts of schemes for the future government and management of educational endowments, “which schemes may provide for altering the conditions and provisions of such endowments, including the powers of investing the funds thereof, or amalgamating, combining, or dividing such endowments, or altering the constitution of the governing bodies thereof, or uniting two or more existing governing bodies.” <sup>3</sup> The commissioners were directed to have special regard to making provision for secondary, or higher, or technical education in public schools or otherwise in the localities to which the endowments belonged, and they were empowered to provide for establishing or aiding industrial museums or libraries.<sup>4</sup> The Act did not apply to any gift made subsequent to the passing of the Education Act of 1872,<sup>5</sup> nor to any endowment belonging to, or administered by, or in gift of any of the Scottish Universities or their colleges, nor to any endowment solely or mainly applicable or applied for purposes of theological instruction, or belonging to any theological institution, without the consent in writing of the founder or the governing body of such endowment, or the *Senatus Academicus* of such University.<sup>6</sup>

**259.** In framing schemes, the Commissioners were directed to have regard to the spirit of the founder’s intentions, and to have regard to the interests of any class whom the founder intended to benefit;<sup>7</sup> and they were also empowered to provide for the alteration of a scheme from time to time by the Court of Session, upon an application made,

<sup>1</sup> 45 & 46 Vict. c. 59.<sup>2</sup> Sec. 1.<sup>3</sup> Secs. 4 and 5.<sup>4</sup> Sec. 7.<sup>5</sup> 35 & 36 Vict. c. 62.<sup>6</sup> Sec. 8.<sup>7</sup> Sec. 15.

with the consent of the Scottish Education Department, by the governing body or by any party interested.<sup>1</sup> Provision was made for the submission of the draft schemes to the Scottish Education Department, whose approval was to be final, unless a case was timeously presented to the Court of Session by someone interested.<sup>2</sup> The deliverance of the Court of Session in any proceeding brought before it under the Act is final.<sup>3</sup>

**260.** In exercising its jurisdiction under the Act, the Court has not to consider for itself what are the best proposals which might be made for increasing the usefulness of the foundation, but whether the proposals actually made by the governing body in the petition before it may be sanctioned, with or without modification. The initiative necessarily rests with the governing body, and the Court can only deal with proposals submitted to it with the consent of the Education Department.<sup>4</sup> But parties having an interest are entitled to come forward and suggest amendments which have not been consented to by the Education Department, even if these amendments are "above the level of mere details, or rising to the position of what have been called organic details," and the Court is entitled to consider them.<sup>5</sup> The Court will not sanction an alteration of a scheme which would have the effect of applying the money of the trust so as to relieve the rates.<sup>6</sup>

**261.** The governing body of any school administered under a scheme approved in terms of this Act is empowered to grant retiring allowances to teachers in its employment.<sup>7</sup> There had been conflicting decisions of the Court upon this point.<sup>8</sup> It was decided that a body of *ex officio* trustees were not entitled to transfer the management of an educational trust to the school board of the district under the 1872 Act.<sup>9</sup> The Education (Scotland) Act, 1908,<sup>10</sup> provides, subject to certain provisos, that the governing body of any intermediate or secondary school administered under a scheme approved in terms of this Act may, with a view to the maintenance of such school as an intermediate or secondary school, transfer the management thereof together with the school buildings and the endowment to the Education Authority of the area in which the school is situated. The same Act provides<sup>11</sup> that where any part of the annual revenue administered under a scheme is

<sup>1</sup> Sec. 20; *Dollar Institution*, 1890, 18 R. 174; *Logan and Johnston School*, 1890, 18 R. 190; *Philip's Trust*, 1893, 20 R. 900; *Jonathan Anderson Trust*, 1896, 23 R. 592; *Bell's Trust*, 1896, 23 R. 780.

<sup>2</sup> Secs. 25, 26, 30.

<sup>3</sup> Sec. 31.

<sup>4</sup> *Heriot's Trust*, 1897, 25 R. 91, per Lord Pres. Robertson at p. 93.

<sup>5</sup> *Stewart's Educational Trust*, 1898, 1 F. 1.

<sup>6</sup> *Prestonpans Kirk Session v. Prestonpans School Board*, 1891, 19 R. 193; *Old Monkland School Board v. Bargaddie Kirk Session*, 1893, 21 R. 122; *Jonathan Anderson Trust*, *supra*.

<sup>7</sup> 1908 Act, s. 12 (2) (a).

<sup>8</sup> *Dollar Institution*, *supra*; *Logan and Johnston School*, *supra*; *Heriot's Trust*, *supra*.

<sup>9</sup> *M'Lean v. Alloa School Board*, 1898, 1 F. 48.

<sup>10</sup> Sec. 29.

<sup>11</sup> Sec. 30.



applicable to the granting of bursaries, or to the payment of fees, such part of the revenue, if not on the average exceeding £50 per annum, shall be paid over in each year by the governing body to the Education Authority of the area, to be applied in accordance with the district bursary scheme framed by the Authority; and if on the average exceeding £50 but not exceeding £1000 per annum, it shall, notwithstanding any provision of the scheme, be applied by the governing body to the granting of bursaries in conformity with the district bursary scheme.

## SECTION 2.—BURSARIES.

**262.** A bursary is an endowment for the maintenance of a student in a Scottish school or university. The institution of bursaries is to be traced to the Reformation. “Bursar” was then the name given to a poor student at a Scottish university. One effect of the Reformation was the suppression of certain benefices or ecclesiastical livings, instituted for the use of the founders, namely, for the service of religion to them and their families. As these had proceeded purely from the bounty of the patron, they were not annexed to the Crown at the Reformation; but while reserved, along with the right of presentation, to the patrons and their heirs, they were bound by statute to apply the revenues arising from such benefices to the support of “bursars.”<sup>1</sup> In recent times many bursaries have been founded by private individuals. The Court has also, in the exercise of its *nobile officium*, sanctioned the institution of bursaries in cases of trust administration, where it has considered a deviation from the original scheme warranted by the fact that it was no longer possible or expedient to apply the funds, or part of them, to the purpose mentioned by the truster.<sup>2</sup>

**263.** Bursary trustees have been allowed to alter the regulations made by the founder.<sup>3</sup> Where bursaries had been founded under a deed of mortification, it was held that the Court was entitled to increase the number of bursars as well as the amount of the bursaries, but that any departure from the number of bursars specified in the deed of mortification could only be justified by the consideration, that to carry out the will of the founder according to its letter would be either inconsistent with the main design of the founder himself or in itself mischievous.<sup>4</sup>

**264.** The Court has refused to interfere with the bursary award on the ground that the unsuccessful candidate, who was suing, could not aver any breach of contract,<sup>5</sup> or vested interest.<sup>6</sup> A candidate in a bursary competition who avers that another has been unduly preferred,

<sup>1</sup> Ersk. i. 5, 12.

<sup>2</sup> *Burnet's Trs.*, 1876, 4 R. 127; *Caw's Tr.* 1878, 5 R. 1014; *Bell's Trust*, 1896, 23 R. 780.

<sup>3</sup> *E.g. Trs. of John Reid Prize*, 1893, 20 R. 938; *Stewart's Trs.*, 1909 S.C. 144; *Glasgow Education Authority*, 1921 S.C. 961.

<sup>4</sup> *University of Aberdeen v. Irvine*, 1869, 7 M. 1087.

<sup>5</sup> *Martins v. MacDougall's Trs.*, 1885, 13 R. 274.

<sup>6</sup> *Ramsay v. United Colleges of St. Andrews*, 1860, 22 D. 1328; *affd.* 1861, 23 D. (H.L.) 8.



is not entitled to claim damages for the loss of the bursary. Such a claim for damages rests on delict and not on contract, and will not be recognised unless supported by clear and articulate averments of pecuniary loss out of entering the competition. Nor, when in point of fact he was not elected to the bursary, can an unsuccessful candidate succeed in getting a decree for declarator that he was elected, and for payment.<sup>1</sup> The proper mode of pleading would be to have a reductive, as well as a declaratory, conclusion.<sup>2</sup> In this case the award of a school bursary, made by the governors after examination, was reduced, and the pursuer found entitled to it. The case, however, turned upon the interpretation of a clause in the regulations for the competition.

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<sup>1</sup> *M'Donald v. M'Coll*, 1890, 17 R. 951.

<sup>2</sup> *M'Quaker v. Ballantrae Educational Trust*, 1891, 18 R. 521.

*Note.*—The following are the citations of the Education (Scotland) Acts: 1872 Act, 35 & 36 Vict. c. 62: 1878 Act, 41 & 42 Vict. c. 78: 1883 Act, 46 & 47 Vict. c. 56: 1897 Act, 60 & 61 Vict. c. 62: 1901 Act, 1 Edw. VII. c. 9: 1908 Act, 8 Edw. VII. c. 63: 1913 Act, 3 & 4 Geo. V. c. 12: 1918 Act, 8 & 9 Geo. V. c. 48: 1925 Act, 15 & 16 Geo. V. c. 81.

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## EIK TO CONFIRMATION.

*See* CONFIRMATION OF EXECUTORS.

# EJECTION.

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### SECTION 1.—DEFINITION.

**265.** The terms “removing” and “ejection” are often used interchangeably, but they are not synonymous. “Removing” denotes the process by means of which a tenant whose right of occupation has expired is judicially warned to remove from the subjects occupied by him and the right which he formerly possessed is judicially cut down. “Ejection” denotes the process by means of which a person is actually thrust forth from the subjects by the officers of law, either where he had a title but it has already been judicially cut down, or where he never had any title to occupy at all. The process of ejection has therefore two significations. It may mean—(1) the purely accessory proceedings by means of which a decree of removing, or other process equivalent to a decree of removing, is carried into effect where the occupant refuses or delays to quit possession of the subjects; or it may mean (2) an independent action by means of which a person possessing no right or title to occupy is put out without the necessity of any previous process of removing. A full discussion of the difference between these two significations of “ejection,” and an account of the history of the process, will be found in the opinions of Lord Johnston and the Lord President in *Campbell’s Trs. v. O’Neill*.<sup>1</sup>

### SECTION 2.—EJECTION AS ACCESSORY TO A DECREE OF REMOVING.

**266.** Decrees of removing are usually obtained in the Sheriff Court, but sometimes, though rarely nowadays, a decree of removing is pronounced in the Court of Session, namely in those cases where the decree is ancillary to a reduction or a declarator. Where the decree is pronounced in the Court of Session it is still necessary to employ the old process of Letters of Ejection. These letters, passing under the Signet, are issued after the execution and registration of a charge on the decree,

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GENERAL AUTHORITIES.—Hunter on Landlord and Tenant, 4th ed., ii. 99; Rankine on Leases, 3rd ed., p. 592; Lees, Sheriff Court Styles, 3rd ed., p. 169; Scots Style Book, iv. 163.

<sup>1</sup> 1911 S.C. 188.

and are directed to the Sheriff of the County, and require him to eject the occupant and put the holder of the decree in possession.<sup>1</sup> In the more ordinary case, however, the decree of removing is obtained in the Sheriff Court, and it contains in itself a warrant of ejection, the decree consisting of an order upon the defender to remove after a forty-eight hours' charge, with a warrant to officers of Court to eject him, failing his removal on the expiry of the charge. Where, however, the process is brought merely to enforce a decree of removing already obtained in the Sheriff Court, the extract warrant *de plano* authorises the officers summarily to eject the defender. Abbreviated forms of these warrants, having the force and effect of the longer forms previously in use, are provided by the Sheriff Courts (Scotland) Extracts Act, 1892.<sup>2</sup>

### SECTION 3.—EJECTION AS AN INDEPENDENT ACTION.

**267.** In this sense ejection is frequently used as equivalent to the summary removing of a tenant. But the term is more strictly applicable to the process appropriate for the removing of persons whose possession or occupancy is either vitious or precarious, *i.e.* is held *vi, clam aut precario*, as having been obtained by force or fraud, or as resting on mere tolerance. In this sense a process of ejection is not a proper method of trying a question of right to possession. Its form is a petition to the Sheriff Court, without warning, for a summary warrant to eject the defender and his effects from the premises. The procedure is the same as in a removing, except that no charge is necessary on the decree, and the extract warrant *de plano* authorises the officers summarily to eject the defender, as in the case above mentioned where a warrant of ejection *de plano* is obtained in order to put into effect a decree of removing already pronounced. A summary decree of ejection, unlike a decree of removing, may competently be brought under review by way of appeal to the Court of Session;<sup>3</sup> but a decree obtained under sec. 37 of the Sheriff Courts (Scotland) Act, 1907, is a decree obtained in a process which is one truly of removing, and it can only be reviewed by suspension.<sup>4</sup>

**268.** This process of summary ejection is available against the following: (a) The heir of a liferent tenant,<sup>5</sup> subject, however, to his rights under the rule *messis sementem sequitur*;<sup>6</sup> (b) a squatter, occupying without any title;<sup>7</sup> (c) an employee whose occupancy of the premises

<sup>1</sup> See Juridical Styles, 3rd ed., iii. 377.

<sup>2</sup> 55 & 56 Vict. c. 17, s. 7, Schedules 9 and 10; see also the Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), First Schedule, Rule 120.

<sup>3</sup> *Clark v. Clarkes*, 1890, 17 R. 1064; *Barbour v. Chalmers & Co.*, 1891, 18 R. 610; *Robb v. Brearton*, 1895, 22 R. 885; *Hutchison v. Alexander*, 1904, 6 F. 532; 57 & 58 Vict. c. 44, s. 5.

<sup>4</sup> *Campbell's Trs. v. O'Neill*, 1911 S.C. 188.

<sup>5</sup> *Gordon v. Michie's Reps.*, 1794, Mor. 13851.

<sup>6</sup> *Stewart v. Grimmond's Reps.*, 1796, Mor. 13853.

<sup>7</sup> *Hutchison v. Alexander*, 1904, 6 F. 532; *Macdonald v. Duchess of Leeds*, 1860, 22 D. 1075; *Hally v. Lang*, 1867, 5 M. 951; *Macdonald v. Watson*, 1883, 10 R. 1079.

is incidental to his employment, on the termination of his employment; <sup>1</sup> (d) a tenant, not as definitively terminating his right to possess, but as suspending it until fulfilment of an obligation to stock or furnish in implement of a decree.<sup>2</sup> A new case is introduced by the Heritable Securities Act, 1894,<sup>3</sup> which provides that where the debtor under a bond and disposition in security is the proprietor and in personal occupation of the lands disposed in security, or of any part of them, and has made default in the punctual payment of interest, or in the due payment of the principal after formal requisition, the creditor, if he desires to enter into possession, may take proceedings to eject him, as an occupant without title. But a liferentrix is not a "proprietor" in the sense of the section.<sup>4</sup> A subtenant of subjects who has not received warning to remove cannot be summarily ejected at the instance of the landlord.<sup>5</sup>

#### SECTION 4.—EXECUTION OF WARRANT.

**269.** In all processes of ejection the judge, even where the pursuer demands immediate ejection, may at his discretion allow a short period before execution of the warrant.

**270.** Ejection must be carried out timeously. If not, and especially if *rei interventus* has followed, it may be held to have been departed from. But it has been held that it was not sufficient to produce this result, that a charge on a decree of removing was not executed until three weeks after the term at which the tenant was ordered to remove.<sup>6</sup> Ejection cannot lawfully be carried out during the night.<sup>7</sup> The limits of night and day do not necessarily coincide with sunrise and sunset. The question is one of circumstances for the determination of a jury.<sup>7</sup> Illegal ejection gives rise to an action of damages,<sup>8</sup> and so also does the obtaining of an illegal warrant to eject, though the warrant has not been executed.<sup>9</sup> The pursuer of a claim of damages for wrongous ejection must shew that he had a legal title to continue in the premises.<sup>10</sup>

<sup>1</sup> *Sinclair v. Tod*, 1907 S.C. 1038; *Whyte v. Haddington School Board*, 1874, 1 R. 1124. But see *Gibson & Son v. Gibson*, 1899, 36 S.L.R. 522 and *Dunbar's Trs. v. Bruce*, 1900, 3 F. 137.

<sup>2</sup> *Macdonald v. McKessack*, 1888, 16 R. 168.

<sup>3</sup> 57 & 58 Vict. c. 44.

<sup>4</sup> *Scottish Union & National Insurance Co. v. Smeaton*, 1904, 7 F. 174.

<sup>5</sup> *Robb v. Brearton*, 1895, 22 R. 885.

<sup>6</sup> *Taylor v. Earl of Moray*, 1892, 19 R. 399.

<sup>7</sup> *McGregor v. Viscount Strathallan*, 1864, 2 M. 1339.

<sup>8</sup> *Brash v. Munro & Hall*, 1903, 5 F. 1102.

<sup>9</sup> *Bisset v. Whitson*, 1842, 5 D. 5.

<sup>10</sup> *Macdonald v. Duchess of Leeds*, 1860, 22 D. 1075; *Macdonald v. Watson*, 1883, 10 R. 1079; *Sinclair v. Tod*, 1907 S.C. 1038.

## EJECTION AND INTRUSION.

See POSSESSORY ACTION.



# ELECTION, OR APPROBATE AND REPROBATE.

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## SECTION I.—INTRODUCTION.

271. The maxim "*Quod approbo non reprobo*" expresses a principle forming part of the doctrine of homologation.<sup>1</sup> In practice the principle is applied most frequently to questions of succession. Its relation to other branches of law, such as sale and workmen's compensation, is dealt with elsewhere. *Quoad* succession, the *ratio* of its application has been thus explained:—"It is equally settled in the law of Scotland as of England that no person can accept and reject the same instrument. If a testator gives his estate to A and gives A's estate to B, courts of equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to give effect to the implied condition contained in the will of the testator. The Court will not permit him to take that which cannot be his but by virtue of the disposition of the will and at the same time to keep what, by the same will, is given, or intended to be given, to another person. It is contrary to the established principles of equity that he should enjoy the benefit while he rejects the condition of the gift."<sup>2</sup>

272. Although the principle referred to has long been recognised by Scottish jurists, it did not until comparatively recent times receive a *nomen juris*. Neither "Approbate and Reprobate" nor "Election"

<sup>1</sup> Bell, Com., 7th ed., i. 141; Bell's Prin., s. 1938 *et seq.*; Ersk. Inst. iii. 3, 49; Prin., 21st ed., pp. 298 and 610; M'Laren, Wills and Succession, i. 246-260.

<sup>2</sup> *Ker v. Wauchope*, 1819, 1 Bligh 1, per Lord Eldon at p. 21.

can be discovered in the Index to More's edition of Stair's Institutions of the Law of Scotland. Bankton devotes no attention to the doctrine under either title. Bell treats "the Scottish doctrine of Approbate and Reprobate" as approaching "nearly to that of Election in English jurisprudence."<sup>1</sup> If justification be sought for the use of the word "Election," it will be afforded in (1) the statement in Bell's Dictionary and Digest of the Law of Scotland<sup>2</sup> to the effect that it has been found convenient to adopt the term "Election" in Scots law; (2) Lord M'Laren's employment of what he styled the "modern name" of the principle of Approbate and Reprobate; and (3) the resemblance of that principle to the English law of election.<sup>3</sup> Whether or not the older Scottish name is preferable, the basis of the principle is the same in England and in Scotland, viz. "It is against equity that any one should take against a man's will and also under it. This rests on no artificial rule, but on plain fair dealing."<sup>4</sup>

273. Illustrations of the application of the principle will be found in the cases undernoted, from which it appears that even the challenge of the invalid exercise of a power of apportionment may necessitate election.<sup>5</sup> Simple instances of the enforcement of the principle are those in which, by accepting testamentary provisions under her father's will, a daughter was barred from claiming legitim,<sup>6</sup> and a widow was disentitled to take provisions under her husband's settlement and claim her *jus relictæ*, with allowances for mournings and aliment.<sup>7</sup> Intricacies, however, have often emerged owing to the fact that election may result in forfeiture of a bequest or in equitable compensation only. "Forfeiture operates in favour of the estate out of which the testamentary provision is given; equitable compensation operates in favour of the estate out of which the legal claim is to be satisfied." Despite Lord M'Laren's indication of disapproval of the use of the word "forfeiture" as a synonym for "equitable compensation,"<sup>8</sup> the use has unfortunately prevailed; so has the expression "legal provisions" in contradistinction to "conventional provisions," although the latter are as "legal" as those rights conferred by Scots law upon spouses and children which limit a Scotsman's or Scotswoman's testamentary power.

## SECTION 2.—REQUISITES OF ELECTION.

274. To make a proper case of election the facts must satisfy three conditions, viz. (1) the person (usually described in the text-books

<sup>1</sup> Bell, Com. i. 142.

<sup>2</sup> 1882 ed., p. 52, col. I.

<sup>3</sup> *Nisbet's Trs. v. Nisbet*, 1851, 14 D. 145, per Lord Cuninghame at p. 149; *Macfarlane's Trs. v. Oliver*, 1882, 9 R. 1138, per Lord Curriehill (Ordinary) at p. 1142; *Douglas-Menzies v. Umphelby*, [1908] A.C. 224, per Lord Robertson at p. 232; *Crum Ewing's Trs. v. Bayly's Trs.*, 1911 S.C. (H.L.) 18; [1911] A.C. 217.

<sup>4</sup> *Douglas-Menzies v. Umphelby*, [1908] A.C. 224, at p. 232.

<sup>5</sup> *Bonhotes v. Mitchell's Trs.*, 1885, 12 R. 984; *Cattanach's Trs. v. Cattanach*, 1901, 4 F. 205; *Crum Ewing's Trs. v. Bayly's Trs.*, *supra*.

<sup>6</sup> *M'Laren v. Howie*, 1869, 8 M. 106.

<sup>7</sup> *Caitness Trs. v. Caitness*, 1877, 4 R. 937.

<sup>8</sup> *Macfarlane's Trs. v. Oliver*, 1882, 9 R. 1138, per Lord M'Laren at p. 1158.

and reports as “the party put to his election”), hereinafter, for brevity’s sake, called the elector, must have had a free choice; (2) the necessity of election must arise from the will, express or implied, of one with power to bind the elector; and (3) the result of election must give legal effect to that will.<sup>1</sup> These conditions will be considered in their order.

#### SUBSECTION (1).—*Free Choice by the Elector.*

**275.** Election must be the spontaneous, deliberate act of the elector in knowledge of his rights.<sup>2</sup> An elector is entitled to ascertain the value of the subjects at stake<sup>3</sup> and should be independently advised.<sup>4</sup> Repudiation within a reasonable time<sup>5</sup> after a settlement has come into operation is permissible if the elector “did not know the two things between which he was to choose.”<sup>6</sup> Executors of an heir are not barred by the negative prescription from challenging a deed under which the heir has possessed lands while he was ignorant of a prior deed.<sup>7</sup> His executors may elect to abide by his approbation of the later deed, or to renounce and restore the benefit taken by him under the earlier. Where other beneficiaries cannot shew an interest to enforce early election the Court will not compel this.<sup>8</sup> Pleas of *mora* and acquiescence are not favourably entertained by the Court as barring right of election.<sup>9</sup> On the other hand, payment to A of a legacy when due cannot be withheld on the ground that B may claim legitim.<sup>10</sup>

#### SUBSECTION (2).—*Power to bind the Elector.*

**276.** Any person putting a party to election must have power and intention to do so, and the elector must have capacity to elect. Subject to the qualification that defective power (*e.g.* that of a minor *re* heritage) does not necessarily bar the imposition of election, the general rule is that anyone having *testamenti factio* according to Scots law can cause election.

<sup>1</sup> *Douglas’s Trs. v. Douglas, &c.*, 1862, 24 D. 1191, per Lord Justice-Clerk Inglis at p. 1208.

<sup>2</sup> M’Laren, Wills and Succession, 3rd ed., p. 247; *Logan v. Logan*, 1869, 7 S.L.R. 40; *Countess Dowager of Kintore v. Earl of Kintore*, 1886, 13 R. (H.L.) 93; 11 App. Cas. 394.

<sup>3</sup> *Gracie v. Gracie’s Trs.* (O.H.), 1909, 2 S.L.T. 89.

<sup>4</sup> *Stewart v. Bruce’s Trs.*, 1898, 25 R. 965.

<sup>5</sup> *Turnbull v. Cowan*, 1848, 6 Bell’s App. 222, per Cottenham L.C. at p. 238; *Keith’s Trs. v. Keith*, 1857, 19 D. 1040; *Home v. Home*, 1876, 3 R. 591.

<sup>6</sup> *Lord Panmure v. Crokatt*, 1854, 17 D. 85, per Lord Robertson at p. 96; cf. *Johnstone v. Paterson*, 1825, 4 S. 234 (N.E. 237); *Hope v. Dickson*, 1833, 12 S. 222; *Selkirk v. Law*, 1854, 16 D. 715; *Inglis v. Breen*, 1890, 17 R. (H.L.) 76; *Dawson’s Trs. v. Dawson*, 1896, 23 R. 1006; *Stewart v. Bruce’s Trs.*, 1898, 25 R. 965; *Duff* (O.H.), 1899, 7 S.L.T. 46.

<sup>7</sup> *Earl of Glasgow’s Tr. v. Earl of Glasgow*, 1872, 11 M. 218.

<sup>8</sup> *Watson’s Trs. v. Watson*, 1910 S.C. 975.

<sup>9</sup> *M’Fadyen v. M’Fadyen’s Trs.*, 1882, 10 R. 285; *Donaldson v. Tainsh’s Trs.*, 1886, 13 R. 967; *Crellin v. Muirhead’s Judicial Factor*, 1892, 20 R. 51; *Wick v. Wick*, 1898, 1 F. 199; *Younger v. Younger’s Trs.* (O.H.), 1900, 7 S.L.T. 453.

<sup>10</sup> *Laing v. Laing*, 1895, 22 R. 575.



SUBSECTION (3).—*Intention to cause Election.*(i) *Expressed Intention.*

277. If a person *major* and *capax* substitutes a provision for a debt or other claim described by its appropriate name, or in language sufficient to identify it, *cadit quæstio*.<sup>1</sup> Where a minor, who cannot dispose *mortis causa* of his heritage, imposes election as a condition in bequest of his personal estate, the condition is probably operative.<sup>2</sup> Cases cited<sup>2</sup> by Professor Bell regarding deeds made on deathbed afford illustrations of the rule that while a conveyance by will might not effectually convey land, benefit as regards moveable estate could not be assumed without fulfilling the condition imposed by the testator affecting heritage which he purported to convey. As no writing by any person dying after 16th August 1871 is challengeable *ex capite lecti*,<sup>3</sup> it is unnecessary here to consider fully those cases. An illegal or impossible condition is held *pro non scripto*.<sup>4</sup> Express stipulations in a deed sufficient to assign moveable estate but ineffectual to dispoise heritage may nevertheless involve relinquishment or disposition of heritable estate as a condition of the acceptance of a bequest of moveables.<sup>2</sup>

(ii) *Implied Intention.*

278. "Where there is no doubt of the power to declare or of the validity of the mode taken for declaring the purpose, the case will depend on the construction or evidence of an intention to make the bequest conditional . . . the design must be manifest . . . no mere conjecture is admissible against the favour which the law entertains for the heir."<sup>2</sup> "The principle of approbate and reprobate requires for its application that the deed, however defective in the matter of power or technical expression, should be, at least, a good intelligible expression of the granter's intention. Indeed, that lies at the bottom of the whole doctrine. The defective deed receives effect, not as a conveyance, but as a condition."<sup>5</sup>

279. Separate deeds forming one settlement are subject to the application of the principle. The question whether or not one settlement has been so formed is determinable only by consideration of the deeds. Reference is made to the undernoted authorities.<sup>6</sup> Some

<sup>1</sup> *Prentises v. Malcolms*, 1749, Mor. 6591; *Cunningham v. Gainer*, 1758, Mor. 617; *Trotter v. Trotter*, 1829, 3 W. & S. 407; *Bennet v. Bennet's Trs.*, 1829, 7 S. 817; *Dundas v. Dundas*, 1830, 4 W. & S. 460.

<sup>2</sup> Bell, Com. i. 143.

<sup>3</sup> 34 & 35 Vict. c. 81.

<sup>4</sup> *Ersk. Inst.* iii. 3, 85; Bell, Com. i. 143.

<sup>5</sup> *Robertson v. Ogilvie's Trs.*, 1844, 7 D. 236, per Lord Fullerton at p. 243; cf. *Trotter v. Trotter*, 1826, 5 S. 78; *Murray v. Smith*, 1828, 6 S. 690; and *Dundas v. Dundas*, 1829, 7 S. 241.

<sup>6</sup> *Countess of Strathmore v. Marquis of Clydesdale*, 1729, Mor. 6377; *Turnbull v. Turnbull*, 1776, 5 Br. Supp. 380; *Wilson v. Henderson*, 1802, 4 Pat. 316; *Hill v. Hunter's Trs.*, 14th May 1818, F.C.; *Stewart v. Stephen*, 1832, 11 S. 139; *Breadalbane Trs. v. Duke and Duchess of Buckingham*, 1840, 2 D. 731; *Black v. Watson*, 1841, 3 D. 522; *Urquhart v. Urquhart*, 1851, 13 D. 742; *Dow v. Beith*, 1856, 18 D. 820; *Harveys v. Harvey's Trs.*,



writers have treated this question as involving four branches of law, viz. (1) that relating to *legatum rei alienæ*, under which those writers deal with cases <sup>1</sup> in which the heir of a marriage or other party may be put to election between a right under marriage contract and a provision under testamentary settlement; (2) the doctrines applicable to cases in which an entail has embraced lands to which the entailer has a valid title and other lands to which his title is defective; <sup>2</sup> (3) the tract of decisions anent the powers of an heir-apparent; and (4) the rules affecting choice between (a) absolute right under an *inter vivos* deed and a conditional provision *mortis causa*; (b) challenge of exercise of a power of appointment and taking a bequest; and (c) reduction *ex capite lecti* or on the ground that bequests of heritage were inhabile in terms, prior to the Titles to Land Consolidation (Scotland) Act, 1868.<sup>3</sup> So far as branches (3) and (4) (c) are concerned, it is sufficient to refer to the authorities quoted *sub voce* "Election, or Approbate and Reprobate" in Green's Encyclopædia of Scots Law, most of the cases there cited being "not likely again to occur in practice."<sup>4</sup>

#### SUBSECTION (4).—*Capacity to Elect.*

##### (i) *Judicial Factor.*

**280.** The question whether or not a judicial factor (including a factor *loco tutoris* and a *curator bonis* to a minor or lunatic) should elect, on behalf of his ward, between legal and testamentary rights is completely within the control of the Court,<sup>5</sup> and is determined by considerations analogous to those in which power to collate has been granted.<sup>6</sup> Where immediate election is not required, the power is refused;<sup>7</sup> but it has been given in cases in which election was urgent in the interests of third parties or of the ward.<sup>8</sup> If no election has been made on behalf of a lunatic he may elect during sanity, and if he dies without having recovered sanity his representatives may elect.<sup>9</sup> A parent cannot deprive his or her insane child of legitim;<sup>10</sup> nor can a parent elect on

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1860, 22 D. 1310; *M'Donald v. M'Donald*, 1876, 4 R. 45; *Somervell v. Somervell*, 1884, 11 R. 1004; *Douglas-Menzies v. Umphelby*, [1908] A.C. 224; *Leslie's Trs. v. Leslie*, 1921 S.C. 940; *Wingate v. Wingate's Trs.*, 1921 S.C. 857.

<sup>1</sup> *E.g. Harveys v. Harvey's Trs.*, *supra*; *Campbell v. Campbell*, 1865, 3 M. 360; *Earl of Glasgow's Tr. v. Earl of Glasgow*, 1872, 11 M. 218; *Bonhotes v. Mitchell's Trs.*, 1885, 12 R. 984.

<sup>2</sup> Sandford on Entails, pp. 183–197; *Douglas's Trs. v. Douglas, &c.*, 1862, 24 D. 1191.

<sup>3</sup> 31 & 32 Vict. c. 101.

<sup>4</sup> 2nd ed., Vol. V. 6–8.

<sup>5</sup> *Turnbull v. Cowan*, 1848, 6 Bell's App. 222; Pupils Protection Act, 1849 (12 & 13 Vict. c. 51), s. 7.

<sup>6</sup> Cf. *Robertson*, 1841, 3 D. 345; *Kennedy v. Kennedy*, 1843, 6 D. 40.

<sup>7</sup> *Morton v. Young*, 11th February 1813, F.C.; *Turnbull v. Cowan*, *supra*; *Morison's Curator bonis v. Morison's Trs.*, 1880, 8 R. 205.

<sup>8</sup> *M'Call's Tr. v. M'Call's Curator bonis*, 1901, 3 F. 1065; *Skinner's Curator bonis*, 1903, 5 F. 914.

<sup>9</sup> *Turnbull v. Cowan*, *supra*; *Morison's Curator bonis v. Morison's Trs.*, *supra*; *Earl of Glasgow's Tr. v. Earl of Glasgow*, *supra*.

<sup>10</sup> *Morton v. Young*, 11th February 1813, F.C.

behalf of any of his or her children.<sup>1</sup> Executors of a child who has died without electing can exercise the right.<sup>2</sup>

(ii) *Trustee in Bankruptcy.*

**281.** A bankrupt is not entitled to reject *legitim* in favour of testamentary provisions from which his or her creditors have been excluded. The trustee in bankruptcy may elect the *legitim*,<sup>3</sup> unless the claim is barred by circumstances which would have prevented the bankrupt from enforcing it.<sup>4</sup> By parity of reasoning, claims *jure relictæ vel relictæ* are in a position similar to that of *legitim*.

(iii) *Trustees nominated in Testamentary Settlement.*

**282.** Unless these have accepted office as tutors and curators they cannot exercise a right of election for pupil or minor claimants.<sup>5</sup>

(iv) *Wife.*

**283.** Where *jus mariti* subsisted, a husband was not entitled to exercise election for his wife,<sup>6</sup> but his consent was necessary,<sup>7</sup> or that of a curator *ad litem*.<sup>8</sup> If a wife made a fair election, her husband's creditors could not set it aside.<sup>9</sup> Conveyance of *acquirenda* in her marriage contract has been held insufficient to bar a wife from electing conventional provisions under her father's will.<sup>10</sup> A widow's right of election, when not exercised by her, has been held to pass to her representatives, but they cannot exercise her right of revocation.<sup>11</sup> Judicial opinion has been reserved on the question whether her right to claim terce passes to her representatives.<sup>12</sup> They can claim *jus relictæ* when she has made no election.<sup>13</sup>

SUBSECTION (5).—*Election must give Effect to Will.*

**284.** When stating<sup>14</sup> that "the result of the election . . . must be to give legal effect and operation to the will . . . express or implied," Lord Justice-Clerk Inglis doubtless had in mind the doctrines of equit-

<sup>1</sup> *Fisher v. Dixon*, 1833, 6 W. & S. 431; cf. *Macnab v. Macnab's Exr.*, 1894, 32 S.L.R. 177.

<sup>2</sup> *Macnab v. Macnab's Exr.*, *supra*.

<sup>3</sup> *Aikman, Petr.*, 1893, 30 S.L.R. 804; *Wishart v. Morison*, 1895, 3 S.L.T. 29.

<sup>4</sup> *Bell's Tr. v. Bell's Tr.*, 1907 S.C. 872.

<sup>5</sup> *Paterson v. Moncrieff*, 1866, 4 M. 706.

<sup>6</sup> *Stevenson v. Hamilton*, 1838, 1 D. 181; *Millar v. Birrell*, 1876, 4 R. 87; *M'Laren, Wills and Succession*, 3rd ed., p. 249.

<sup>7</sup> *Miller v. Galbraith's Trs.*, 1886, 13 R. 764.

<sup>8</sup> *Sillars v. Sillars*, 1911 S.C. 1207. But see *Married Women's Property (Scotland) Act*, 1920 (10 & 11 Geo. V. c. 64), s. 1.

<sup>9</sup> *Lowson v. Young*, 1854, 16 D. 1098; cf. *Macdougall v. Wilson*, 1858, 20 D. 658.

<sup>10</sup> *Mackenzie's Trs. v. Beveridge's Trs.*, 1908 S.C. 1185.

<sup>11</sup> *Edward v. Cheyne*, 1888, 15 R. (H.L.) 33; 13 App. Cas. 373.

<sup>12</sup> *Pringle's Exrs.*, 1870, 8 M. 622.

<sup>13</sup> *Mackenzie v. Mackenzie's Trs.*, 1873, 11 M. 681.

<sup>14</sup> *Douglas's Trs. v. Douglas*, 1862, 24 D. 1191, at p. 1207.

able compensation and forfeiture. These doctrines will be considered later.<sup>1</sup>

### SECTION 3.—PROPERTY SUBJECT TO ELECTION.

**285.** This has been held to include interest in an entailed estate;<sup>2</sup> Scottish heritage conveyed by a testator who died domiciled in England;<sup>3</sup> English or foreign property belonging to a Scotsman whose settlement was ineffectual to convey it but indicated his intention to do so;<sup>4</sup> and property under special destinations forming part of a scheme of testamentary settlement.<sup>5</sup>

### SECTION 4.—CASES WHERE ELECTION IS UNNECESSARY.

**286.** Executorship being an administrative office, its acceptance does not bar a person holding that office from claiming legal instead of conventional provisions. Accordingly a widow appointed executrix under her husband's will is not bound to elect between accepting the office and claiming her legal rights.<sup>6</sup>

**287.** A legatee who has also a claim *ex lege* to part of a testator's estate is not bound to elect if by abandonment of his claim *ex lege* the subject of that claim would not be surrendered to the uses of the will, but would fall into intestacy.<sup>7</sup> Where there is partial intestacy, the rules of succession in intestacy apply to the estate undisposed of, and those electing their conventional provisions are not precluded from inheriting that estate.<sup>8</sup> Nor is a child barred, by claiming legitim, from demanding the cost of upbringing and education (so far as that cost has not been met by legitim) provided for under the father's settlement.<sup>9</sup> A widow has been held entitled, without election, to a pension,<sup>10</sup> and in another case to the proceeds of a policy of insurance (effected by her husband on his life),<sup>11</sup> on the ground that neither the pension nor the policy formed part of his testamentary estate. Under marriage

<sup>1</sup> See para. 290 *et seq.*, *infra*.

<sup>2</sup> *Carmichael v. Carmichael*, 15th November 1810, F.C.; *Smyth v. Murray*, 9th December 1814, F.C.

<sup>3</sup> *Martin v. Martin & Stone*, 1795, 3 Pat. 421; *Campbell v. Munro*, 1836, 15 S. 310; *Murray v. Baillie*, 1849, 11 D. 710; *Lamb v. Montgomerie*, 1858, 20 D. 1323; *Campbell's Trs. v. Campbell*, 1862, 24 D. 1321.

<sup>4</sup> *Dundas v. Dundas*, 1830, 4 W. & S. 460; cf. *Alexander v. Bennet's Trs.*, 1829, 7 S. 817.

<sup>5</sup> *Dallas's Trs. v. Dallas* (O.H.), 1905, 13 S.L.T. 332.

<sup>6</sup> *Smart v. Smart*, 1926 S.C. 392.

<sup>7</sup> *Hewit's Trs. v. Lawson*, 1891, 18 R. 793; *Brown's Trs. v. Gregson*, 1920 S.C. (H.L.) 87; [1920] A.C. 860.

<sup>8</sup> *Stoddart v. Thomson*, 1734, Elch. "Succession" No. 1; *Blackwood v. Dykes*, 1833, 11 S. 443; *Sinclair v. Traill*, 1840, 2 D. 694; *Wilson v. Gibson*, 1840, 2 D. 1236; *Maitland v. Maitland*, 1843, 6 D. 244; *Naismith v. Boyes*, 1899, 1 F. (H.L.) 79; *Moon's Trs. v. Moon*, 1899, 2 F. 201; *Crawford's Trs. v. Crawford* (O.H.), 1899, 7 S.L.T. 205; *Farquharson v. Kelly*, 1900, 2 F. 863; *Scott v. Gowans* (O.H.), 1916, 1 S.L.T. 404; *Symmer's Trs. v. Symmers*, 1918 S.C. 337; *Wingate v. Wingate's Trs.*, 1921 S.C. 857.

<sup>9</sup> *Urquhart's Exrs. v. Abbott*, 1899, 1 F. 1149.

<sup>10</sup> *Craigie's Trs. v. Craigie*, 1904, 6 F. 343.

<sup>11</sup> *Hay's Trs. v. Hay*, 1904, 6 F. 978.



contract, spouses had power to apportion a fund among their children; the husband's settlement, signed by both spouses, contained a valid joint appointment of the fund, with invalid conditions added; election by the children between shares of the fund and bequests under the settlement was not required.<sup>1</sup>

**288.** A child accepting conventional provisions from one of his or her parents is not excluded from claiming legitim out of the estate of the other,<sup>2</sup> even if the parent whose conventional provisions have been taken has provided that they shall be in full of legitim from the estates of both parents.<sup>3</sup> Unless legitim has been discharged by marriage contract, provisions under the contract may be accepted with testamentary provisions or legitim.<sup>4</sup> Challenge, by a widower, of a deed purporting to terminate a trust constituted by antenuptial contract has been held not to involve forfeiture of provisions in his favour under the will of his wife.<sup>5</sup>

**289.** Notwithstanding a declaration by a testator that his legacy to any claimant objecting to his will or to the exercise of powers thereby conferred shall become null, legatees who are also heirs *ab intestato* are not bound to elect between their legacies and their rights on intestacy.<sup>6</sup> No case of election arises where the deed of the donor of the conventional provision is successfully challenged on the ground that he had no disposing mind;<sup>7</sup> that the deed was impetrated by fraud and circumvention,<sup>8</sup> or vitiated *in essentialibus*;<sup>9</sup> or on any other valid ground of reduction.<sup>10</sup>

## SECTION 5.—EQUITABLE COMPENSATION AND FORFEITURE.

### SUBSECTION (1).—Generally.

**290.** The "unclaimed provision accrues to the person or class of persons whose interests are diminished by reason of the mode in which the right of election has been exercised."<sup>11</sup> Acceptance of a provision in lieu of terce,<sup>12</sup> courtesy,<sup>13</sup> *jus relictæ vel relictæ*, or legitim operates as a discharge of the non-conventional claim, the amount of which is then available for the purposes of the deed under which the provision was made. Discharge of legitim by a child during the parent's life has the effect of lapse, *quoad* that child's claim, and the benefit enures

<sup>1</sup> *Matthews Duncan's Trs. v. Matthews Duncan*, 1901, 3 F. 533.

<sup>2</sup> *Buckle v. Buckle's Curator* (O.H.), 1907, 15 S.L.T. 98.

<sup>3</sup> *Moon v. Moon's Trs.*, 1909 S.C. 185.

<sup>4</sup> *Murray's Trs. v. Murray*, 1881, 18 S.L.R. 690; *Somerville's Trs. v. Dickson's Trs.*, 1887, 14 R. 770. Contrast with these *Darling's Exr. v. Darling* (O.H.), 1869, 41 Sc. J. 545; *Crum Ewing's Trs. v. Bayly's Trs.*, 1888, 15 R. 507; *Lord Inverclyde's Trs. v. Lord Inverclyde*, 1910 S.C. 420.

<sup>5</sup> *Hay v. Hay's Trs.* (O.H.), 1913, 1 S.L.T. 54.

<sup>6</sup> *Brown's Trs. v. M'Intosh* (O.H.), 1905, 13 S.L.T. 72.

<sup>7</sup> *Black v. Watson*, 1841, 3 D. 522, per Lord Moncreiff at p. 533.

<sup>8</sup> *Dow v. Beith*, 1856, 18 D. 820.

<sup>9</sup> *Robertson v. Ogilvie's Trs.*, 1844, 7 D. 236.

<sup>10</sup> *MacLaren*, Court of Session Practice, p. 684.

<sup>11</sup> *M'Laren*, Wills and Succession, 3rd ed., i. 255.

<sup>12</sup> 1681, c. 10.

<sup>13</sup> *M'Laren*, Wills and Succession, 3rd ed., i. 256.



to the child or children electing to claim legitim.<sup>1</sup> On the other hand, acceptance after the parent's death of a provision in satisfaction of legitim operates in favour of disponees under the settlement and not of any child claiming legitim.<sup>2</sup> Upon the principles underlying the decisions last cited, it follows that a discharge of legitim by all the children during the parent's lifetime operates in favour of the surviving spouse and the testamentary disponees or next of kin, whereas a similar discharge after the parent's death benefits only the disponees or next of kin. Similarly, discharge of *jus relictæ* after the death of the predeceasing spouse does not affect the amount of legitim, but benefits the disponees—usually the residuary legatees.<sup>3</sup>

**291.** Unless the claimant of equitable compensation can shew that the provision in his favour has been prejudiced by election, the claim will be repelled.<sup>4</sup>

**292.** Failing express declaration to the contrary, acceptance of legitim instead of a conventional provision not stated to be in full of legitim does not infer entire forfeiture of the provision, but results merely in equitable compensation to those prejudiced by the acceptance. After that compensation has been made, the claimant of legitim may revert to the position of a beneficiary.<sup>5</sup>

#### SUBSECTION (2).—*Disposal of Surrendered Provision.*

**293.** Among the many cases raising this question, *e.g.* between representatives in intestacy and beneficiaries, liferenters and fiars, heir and executor, and the elector or his or her children and other beneficiaries, those undernoted are useful examples.<sup>6</sup> Space does not permit their examination here in detail. Obviously the decision in each depends largely on the terms of the settlement under consideration.

#### SUBSECTION (3).—*Subjects out of which Compensation is Payable.*

##### (i) *Accumulations of Income.*

**294.** Retention beyond twenty-one years may be prohibited.<sup>7</sup>

<sup>1</sup> *Hog v. Lashley*, 1792, 3 Pat. 247; *Lord Panmure v. Crokat*, 1856, 18 D. 703; cf. *Martin v. Agnew*, 1749, Mor. 8167; *M'Gill v. Oxenford*, 1671, Mor. 8179.

<sup>2</sup> *Fisher v. Dixon*, 1841, 3 D. 1181. <sup>3</sup> *Campbell's Trs. v. Campbell*, 1862, 24 D. 1321.

<sup>4</sup> *Snody's Trs. v. Gibson's Trs.*, 1887, 24 S.L.R. 493; *Gunn's Trs. v. Macfarlane*, 1900, 37 S.L.R. 499.

<sup>5</sup> *Macfarlane's Trs. v. Oliver*, 1882, 9 R. 1138; cf. *Jack's Trs. v. Jack*, 1913 S.C. 815. Contrast *Rose's Trs. v. Rose*, 1916 S.C. 827.

<sup>6</sup> *Nisbet's Trs. v. Nisbet*, 1851, 14 D. 145; *Harvey's Trs. v. Harvey's Trs.*, 1862, 1 M. 345; *Davidson's Trs. v. Davidson*, 1871, 9 M. 995; *Johnston v. Johnston*, 1875, 2 R. 986; *Jack v. Marshall*, 1879, 6 R. 543; *Gillies v. Gillies's Trs.*, 1881, 8 R. 505; *Macfarlane's Trs. v. Oliver*, *supra*; *Snody's Trs. v. Gibson's Trs.*, 1883, 10 R. 599; *Russell's Trs. v. Gardiners*, 1886, 13 R. 989; *Campbell's Trs. v. Campbell*, 1889, 16 R. 1007; *Brown's Trs. v. Gregson*, 1916 S.C. 97; *Hannah's Trs. v. Hannah*, 1924 S.C. 494.

<sup>7</sup> *Thellusson Act*, 1800 (39 & 40 Geo. III. c. 98); *Gillies's Trs. v. Bain*, 1893, 30 S.L.R. 651; *Innes's Trs. v. Bowen*, 1920 S.C. 133.

(ii) *Capital.*

295. Encroachment on capital, with a view to compensating a widow for loss of income, bequeathed to her by her husband has been forbidden, although the loss was due to claims for legitim; but the possibility of a claim by her representatives was not negatived.<sup>1</sup>

(iii) *Heritage.*

296. Circumstances have occurred in which a widow was held entitled to the fee of heritage to compensate her *pro tanto* for depletion of benefit under her husband's settlement, the loss having been sustained through their son's election of legitim.<sup>2</sup> On the other hand, where a testator's widow claimed terce of heritage specially destined by him to his sons, they were held entitled to equitable compensation.<sup>3</sup>

SUBSECTION (4).—*Repudiation of Liferent.*

297. Frequently the surrendered bequest consists of a liferent. It was so in a leading case<sup>4</sup> where a testator directed his trustees to pay certain rents to his two daughters and the survivor. One daughter claimed legitim; the Court held that the interest of the other daughter was not enlarged by the forfeiture. Another difficulty in connection with a bequest of liferent arose in a case in which A left the residue of his estate to his five children equally, and the survivors in liferent, and their issue in fee. All his children claimed legitim; one, B, died before the estate had been fully compensated for her share of legitim. It was held that a child, C, was not entitled to ascribe, in compensation of the sum paid to her as legitim, any of her liferent under the clause of survivorship until the fiars had been compensated in respect of the legitim paid to B.<sup>5</sup>

298. Where provision is made for liferent to one beneficiary and the fee to his or her issue, and the parent rejects the provision of liferent, it does not necessarily follow that the bequest to the issue is thereby forfeited.<sup>6</sup> If possible, the Court will uphold as a separate bequest the provision in favour of the issue.<sup>7</sup> *A fortiori* if the liferent provision has been revoked, even an express declaration of forfeiture *quoad* the rights of the descendants in the event of the parent repudiating the settlement will not receive effect; the parent has not, in the case figured, repudiated the settlement.<sup>8</sup>

<sup>1</sup> *M'Leod v. Love*, 1914 S.C. 983; see also *Hood's Trs. v. Hood* (O.H.), 1905, 13 S.L.T. 564.

<sup>2</sup> *Ross v. Ross*, 1896, 23 R. 1024.

<sup>3</sup> *Dallas's Trs. v. Dallas* (O.H.), 1905, 13 S.L.T. 332.

<sup>4</sup> *Breadalbane's Trs. v. Pringle*, 1841, 3 D. 357.

<sup>5</sup> *Clark v. Clark's Trs.* (O.H.), 1905, 13 S.L.T. 694.

<sup>6</sup> *Snody's Trs. v. Gibson's Trs.*, 1883, 10 R. 599; *Brown's Trs. v. Gregson*, 1916 S.C. 97; but see *Jack v. Marshall*, 1879, 6 R. 543; *Campbell's Trs. v. Campbell*, 1889, 16 R. 1007, and *M'Caull's Trs. v. M'Caull*, 1900, 3 F. 222.

<sup>7</sup> *Gillies v. Gillies's Trs.*, 1881, 8 R. 505.

<sup>8</sup> *Urie's Trs. v. Urie*, 1896, 23 R. 865.

SUBSECTION (5).—*Date of Division.*

**299.** Questions have arisen concerning the date of division of a surrendered bequest. Immediate distribution among the residuary legatees was authorised in a case where a testator had bequeathed the liferent of his estate to his widow in satisfaction of her terce and *jus relictæ*, and she claimed her legal provisions; but the fee had vested *a morte testatoris*.<sup>1</sup>

SUBSECTION (6).—*Interest on Advances.*

**300.** In estimating the extent of compensation where a child elected legitim instead of a provision of liferent, the fee of which provision was destined to her issue, the Court has held that advances for maintenance of the issue were chargeable against capital, but that no interest on the advances should be credited to the parent as no interest had been received.<sup>2</sup>

SUBSECTION (7).—*Expenses.*

**301.** While the award of expenses is always in the discretion of the Court, the decision in the case undernoted affords guidance, the *ratio* of that decision being that if trustees litigate (in the interests of beneficiaries) concerning a liferent, the expenses incurred by them do not fall to be compensated out of that liferent, but form a charge against the trust estate.<sup>3</sup>

## SECTION 6.—INTERNATIONAL LAW.

**302.** To questions of election involving a conflict of laws the following general principles of international law apply:—1st, the law of the domicile determines the construction of the settlement;<sup>4</sup> 2nd, the *lex rei sitæ* determines the quality of the subject; and 3rd, the same law determines whether the will operates as a conveyance of real or heritable property. Thus, where a Scotsman left a foreign will, disposing *inter alia* of a Scots heritable bond, the Scots Courts determined (1) that the will was ineffectual to carry it; but (2) that the testator's intention was to convey it, and therefore that the heir-at-law, taking the heritable bond *ab intestato*, was barred by election from taking under the will.<sup>5</sup> But where an Englishman left an English will disposing of Scots heritage, while the Scots law determined that the deed did not operate as a conveyance, it was for the English law to determine the intention. A reference to that law determined that the testator did not intend to convey the heritage, and therefore that the heir was not put to election.<sup>6</sup>

<sup>1</sup> *Annandale v. M'Niven*, 1847, 9 D. 1201; cf. *Lee's Trs. v. Fingzies* (O.H.), 1896, 34 S.L.R. 613.

<sup>2</sup> *Main v. Clark's Trs.*, 1909, 47 S.L.R. 118.

<sup>3</sup> *Paton v. Paton's Trs.*, 1903, 5 F. 528.

<sup>4</sup> *Hewit's Trs. v. Lawson*, 1891, 18 R. 793.

<sup>5</sup> *Loudon v. Loudon*, 1811, Hume 23; cf. *Dundas v. Dundas*, 1829, 7 S. 241, and 1830, 4 W. & S. 460; and *Bennet v. Bennet's Trs.*, 1829, 7 S. 817.

<sup>6</sup> *Robertson*, 16th February 1816, F.C.; cf. *Trotter v. Trotter*, 1826, 5 S. 78 (N.E. 72), and 1829, 3 W. & S. 407; *Murray v. Smith*, 1828, 6 S. 690; *Campbell v. Munro*, 1836, 15 S. 310.

## ELECTRICITY.

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## SECTION 1.—HISTORICAL INTRODUCTION.

SUBSECTION (1).—*National Policy in Electrical Development.*

**303.** The utilisation of electrical energy on a commercial scale is an enterprise of which the history is confined within the last fifty years. The initial national policy was early laid down in public general legislation which provided a system in harmony with the prevailing engineering practice, framed on the model of the Gasworks Acts, and characterised by the creation of a large number of independent local monopolies with small undertakings operating in isolation and subject to numerous pre-

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GENERAL AUTHORITIES.—Will's Electric Lighting ; Dalton's Electricity (Supply) Act, 1926 ; Rimmer and Allan, Electricity (Supply) Act, 1926 ; Report of Lord Weir's Committee, 1926 ; Annual Reports issued by the Electricity Commissioners ; Report of Electric Power Supply Committee [Cd. 9062, 1918] ; Report of Viscount Cross's Committee [Parl. Paper, 1898, No. 213].



cautionary restrictions. Adequate as this system was to meet the needs of a period when electricity was employed almost exclusively for lighting, and where a high factor of safety was more important than the rapid development of the electrical industry, its deficiencies became apparent when electricity came to be applied for power purposes and when the tendency in technical practice changed in the direction of concentrating generation in a few stations of very large capacity and co-ordinating distribution over large areas by means of a network of extra high-tension transmission lines. In an endeavour to keep pace with changing engineering methods, and so to overtake foreign competitors who were later in the field and had benefited from the experience of the pioneers in electrical development, the Legislature successively adopted two expedients. In the first instance an attempt was made progressively to modernise the original system by providing an increasingly stringent central control over individual development, and by facilitating, and even requiring, co-ordination and combination in such matters as bulk supplies between authorities responsible for the supply of electricity. The method of co-operation between large suppliers in highly developed districts rapidly attained success. Substantial progress was being made along these lines with notable benefits to the industrial areas of the country, but impatience with the results achieved was felt in certain quarters; and in 1926 the Legislature was constrained to substitute for the evolutionary method the novel policy of the Act of 1926, of which the keynote is the virtual nationalisation of the wholesale supply of electrical energy. Between the Act of 1882 and the Weir Report of 1926 the national policy has thus passed through every stage of development from parochialism to centralised official control. Only time will shew whether the substantial economies anticipated under the new system as against the method of individual development will in fact be realised.

#### SUBSECTION (2).—*Electricity Legislation.*

**304.** The public general statutes dealing with the supply of electricity are as follows:—(1) The Electric Lighting Act, 1882;<sup>1</sup> (2) The Electric Lighting Act, 1888;<sup>2</sup> (3) The Electric Lighting (Scotland) Act, 1890;<sup>3</sup> (4) The Electric Lighting (Clauses) Act, 1899;<sup>4</sup> (5) The Electric Lighting (Scotland) Act, 1902;<sup>5</sup> (6) The Electric Lighting Act, 1909;<sup>6</sup> (7) The Electricity (Supply) Act, 1919;<sup>7</sup> (8) The Electricity (Supply) Act, 1922;<sup>8</sup> and (9) The Electricity (Supply) Act, 1926.<sup>9</sup> These statutes (with the exception of the Clauses Act of 1899) have been given the comprehensive title of the Electricity (Supply) Acts, 1882 to 1926.<sup>10</sup> They will be referred to below solely by the years in which they were respectively enacted.

<sup>1</sup> 45 & 46 Vict. c. 56.

<sup>4</sup> 62 & 63 Vict. c. 19.

<sup>7</sup> 9 & 10 Geo. V. c. 100.

<sup>10</sup> *Ibid.*, s. 52.

<sup>2</sup> 51 & 52 Vict. c. 12.

<sup>5</sup> 2 Edw. VII. c. 35.

<sup>8</sup> 12 & 13 Geo. V. c. 46.

<sup>3</sup> 53 & 54 Vict. c. 13.

<sup>6</sup> 9 Edw. VII. c. 34.

<sup>9</sup> 16 & 17 Geo. V. c. 51.

SUBSECTION (3).—*The Period of the Electric Lighting Orders.*

**305.** It is possible to trace four distinct stages in the development of electrical policy and legislation. The first period commenced in 1882 and ended about 1900. At this time the "public purposes" for which electricity might be used were defined as including only the lighting of public streets, churches, halls, and theatres,<sup>1</sup> and until 1919 the generation and transmission of energy was treated as merely incidental to the supply of electricity under "the Electric Lighting Acts."<sup>2</sup> The characteristic feature of the period was the grant by the Board of Trade in the form of Provisional Orders or Licences of large numbers of monopoly rights entitling undertakers to "supply" electricity within defined areas subject (in the case of company undertakers) to the option of the local authorities within such areas to purchase the undertaking after stated intervals. The "areas of supply" were usually small, and defined without reference to technical considerations; but under the original "Electric Lighting Acts"<sup>2</sup> the requirements of these areas were gradually met, more or less adequately, by large numbers of large and small undertakers (both local authorities and distribution companies), acting independently of each other.

SUBSECTION (4).—*The Period of the Power Companies.*

**306.** The second period, which lasted from 1900 until the later War years, was inaugurated by the Report of the Joint Committee on Electrical Energy (Generating Stations and Supply),<sup>3</sup> which sat in 1898 under the chairmanship of Viscount Cross. This Committee displayed commendable foresight in advocating the creation of more extensive areas of supply and the use of plant of large dimensions and high voltage to permit of the application of electrical power to industry. In pursuance of these suggestions a considerable number of Private Acts were passed from 1900 onwards creating what subsequently came to be known as "Power Companies," authorised in perpetuity to generate and supply *in bulk or for power purposes* over wide areas.<sup>4</sup> Power Companies were thus enabled to operate under conditions technically more favourable for the provision of a cheap supply, and many of them, particularly those serving the main industrial districts of the country, attained a large measure of success. Throughout the rest of the country, however, the immense increase in the demand for power during the War demonstrated the inadequacy and relative inefficiency of the system of generation then in vogue. During this period, the growing need for closer regulation of independent enterprise was recognised in the provisions of

<sup>1</sup> 1882, s. 3.

<sup>2</sup> Parl. Paper, 1898, No. 213.

<sup>2</sup> So designed by 9 Edw. VII. c. 34, s. 27.

<sup>4</sup> The principal "power companies" in Scotland are the Grampians Company, the Clyde Valley Company, the Lothians Company, the Scottish Central Company, and the Fife Company.

the Act of 1909 prohibiting any local authority, company, or person from commencing to supply within the area of an existing authorised undertaker,<sup>1</sup> and authorising, and in certain instances requiring, the giving and taking of bulk supplies.<sup>2</sup>

SUBSECTION (5).—*The Period of District Co-ordination.*

**307.** Constructive proposals for a radical remedy were advanced in 1918 by the Electric Power Supply Committee, presided over by Lord Forres, whose recommendations<sup>3</sup> were partially embodied in the Act of 1919 and the subsequent amending Act of 1922. The basic idea of the Committee's proposals was the grouping of areas into large districts with a view to district co-ordination of supplies by means of the creation of district electricity boards with powers of compulsory purchase. The Bill which was framed to carry these proposals into operation emerged from its passage through Parliament in mutilated form; and the Acts of 1919 and 1922, based as they were for the most part upon a policy of suasion, failed adequately to produce the expected results. But the creation of the Electricity Commissioners,<sup>4</sup> the provisions relating to the formation of "electricity districts"<sup>5</sup> and "joint electricity authorities,"<sup>6</sup> the prohibitions against the unauthorised establishment of new, or the extension of existing, generating stations or main transmission lines,<sup>7</sup> and the powers conferred on the central authority to regulate type of current, frequency, and pressure<sup>8</sup> marked a notable advance towards the assumption on the part of the Government of paramount control over generation and primary transmission.

SUBSECTION (6).—*The Electrical Position in 1926.*

**308.** Before turning to the final stage which has just opened with the passing of the Act of 1926, it will be useful for a proper appreciation of the old law, in so far as it survives, and of the new system, by which it will very largely be superseded, to consider briefly the present technical position.<sup>9</sup> There were in 1926 no less than 593 authorised undertakers with supply powers, of which 353 were local authorities, 3 were joint boards, 2 were joint electricity authorities, 207 were electricity companies, and 28 were "power companies." Out of a total of 438 generating stations operated by authorised undertakers, only 50 were reported to be of suitable size and efficiency. The national Load Factor<sup>10</sup> was 24.9. Ten per cent. of the plant installed was generating direct current, and the alternating current plant was generating at 14 different frequencies, the predominating frequency being one of 50 cycles. Eight "electricity districts" (with or without "joint electricity authorities")

<sup>1</sup> 1909, s. 23.

<sup>2</sup> *Ibid.*, s. 4.

<sup>3</sup> [Cd. 9062], 1918.

<sup>4</sup> 1919, ss. 1-4.

<sup>5</sup> *Ibid.*, s. 5.

<sup>6</sup> *Ibid.*, s. 6; 1922, s. 20.

<sup>7</sup> 1919, s. 11.

<sup>8</sup> *Ibid.*, s. 24.

<sup>9</sup> *Vide* the Sixth Annual Report of the Electricity Commissioners, and the Weir Report, 1926.

<sup>10</sup> For definition, see para. 337 *infra*.



had been set up under the 1919 Act, and of these only one, the Edinburgh and Lothians District, is situated in Scotland.<sup>1</sup> From these facts and figures it will be apparent that, except in the main industrial areas, the development of electricity in this country has until lately been marked by lack of system, which is reflected in certain districts in high cost, inefficiency, and low consumpt per head of population. As a producer and consumer of electrical energy, Britain stands low among the industrial countries of the world; and while this disquieting result is doubtless due in the main to the fact that, before the introduction of electricity, power production had been stereotyped on a steam basis, it is also attributable to the slow evolution of the national policy.

SUBSECTION (7).—*The Weir Report and National Co-ordination.*

**309.** A radical remedy was proposed in the Report of Lord Weir's Committee in 1926 which furnished the basis for the latest step in the development of electrical policy. The Committee's recommendations have been embodied largely without modification in the recent Act. The provisions of the Act will be examined later; but its main purposes are to pool the electrical resources of the whole country by means of an official "grid" of interconnecting transmission lines operated at a standardised frequency, and to establish in the Central Electricity Board a paramount authority for the wholesale supply of energy, with power to assume control over selected generating stations of high efficiency which will provide the energy to feed the "grid." Except in minor details, distribution of energy is left unaffected. The theoretical ideal of a unified system of generation and primary transmission for the whole country has thus been realised on the statute book, and is in process of being carried out in practice.<sup>2</sup>

**310.** So far as the law relating to electricity is concerned, the conditions of the problem have been fundamentally altered by the new Act; and while in the following pages an endeavour will be made briefly to survey the whole field, it is necessary to observe that the problems of the future will probably differ widely from those of the past.

SECTION 2.—CENTRAL AUTHORITIES.

SUBSECTION (1).—*Minister of Transport.*

**311.** The Minister of Transport <sup>3</sup> has since 1919 superseded the Board of Trade as the Central authority in all matters affecting electricity.<sup>4</sup>

<sup>1</sup> The English and Welsh districts are London and Home Counties, West Midlands, South-West Midlands, South-East Lancashire, Mid-Lancashire, East Midlands, and North Wales and South Cheshire. Proceedings for the creation of a West of Scotland District are incomplete.

<sup>2</sup> The first scheme under the new Act, viz. the Central Scotland Scheme, was adopted on 29th June 1927. The second scheme, for south-east England, was published in October 1927. It is understood that no further Scottish schemes are in contemplation.

<sup>3</sup> Appointed under 9 & 10 Geo. V. c. 50.

<sup>4</sup> 1919, s. 39; S.R. & O., 1920, No. 58.



Most of his functions are performed by the Electricity Commissioners,<sup>1</sup> to whom he is specifically directed to refer for advice on all matters connected with the exercise and performance of his powers and duties, except (a) the appointment of Commissioners, and (b) where any act or order of the Commissioners is expressly made subject to his approval or appellate jurisdiction.<sup>2</sup>

#### SUBSECTION (2).—*The Electricity Commissioners.*

**312.** The appointment of Commissioners, not exceeding five in number, “for promoting, regulating, and supervising the supply of electricity” was authorised by s. 1 of the Act of 1919. The Commissioners, of whom three must be selected for practical and scientific knowledge and wide business experience, including that of electrical supply,<sup>3</sup> are solely responsible to the Minister of Transport and act under his direction<sup>4</sup> in the performance of multifarious executive, administrative, and quasi-judicial duties, the principal of which will be subsequently noticed. The Commissioners are not created a body corporate, and it would seem that an action against them should be laid against the Minister of Transport.<sup>5</sup> The expenses of the Commissioners are defrayed by a levy on all joint electricity authorities and authorised undertakers apportioned on the basis of “units sold,” *i.e.* units generated less (a) energy used in generating stations, (b) transmission and distribution losses, and (c) bulk sales to other undertakers.<sup>6</sup> The Commissioners are empowered to conduct experiments for the improvement of electricity supply or the utilisation of fuel or water-power,<sup>7</sup> and may appoint and confer with expert advisory committees.<sup>8</sup> They also exercise the powers in regard to sanctioning borrowing originally conferred on the Secretary for Scotland.<sup>9</sup>

#### SECTION 3.—LOCAL AUTHORITIES.

##### SUBSECTION (1).—*The Local Authority and Local Rate.*

**313.** The local authorities are the Town Council and the County Council for burghs and counties respectively,<sup>10</sup> subject to the right in a Town Council to delegate its functions to local gas commissioners.<sup>11</sup> When a town council is empowered by any general<sup>12</sup> or local Act to supply gas, or has delegated its functions to gas commissioners, the “local rate” for electricity purposes<sup>13</sup> is the gas rate or revenue; in all other cases in burghs the “local rate” is the burgh general assessment or similar rate.<sup>14</sup> In counties the charge is on the county consolidated rate.<sup>14</sup> Local

<sup>1</sup> 1919, s. 2 specifically authorises such delegation of function, and the principal powers still reserved to the Minister are those relating to 1882, ss. 28, 29, and 30; 1888, s. 2; 1899, ss. 10 (6), 14, and 32; powers in regard to the appointment of arbiters; powers in regard to cesser of powers; and powers with reference to revision of prices.

<sup>2</sup> 1919, s. 39 (2).

<sup>3</sup> *Ibid.*, ss. 1, 2, 39.

<sup>4</sup> *Ibid.*, s. 1 (4).

<sup>5</sup> 9 & 10 Geo. V. c. 50, s. 26.

<sup>6</sup> 1919, s. 29; 1922, s. 7.

<sup>7</sup> 1919, s. 3.

<sup>8</sup> *Ibid.*, s. 4.

<sup>9</sup> *Ibid.*, s. 20; 1902, s. 1.

<sup>10</sup> 1890, s. 1 and Sched.

<sup>11</sup> *Ibid.*, s. 2.

<sup>12</sup> See Burghs Gas Supply (Scotland) Acts, 1876 to 1918.

<sup>13</sup> *E.g.*, under 1882, s. 7.

<sup>14</sup> 1890, Sched.

authorities may be conjoined by Special Order under a joint committee, joint board, or otherwise for the purposes of the exercise of their powers under the Electricity Acts.<sup>1</sup>

#### SUBSECTION (2).—*General Powers and Duties.*

**314.** The powers and duties of a local authority *qua* authorised undertakers are dealt with *infra*.<sup>2</sup> In addition to exercising these powers and duties, the local authority has various minor responsibilities to discharge. The consent of a local authority, unless specially dispensed with, is required for the grant of a licence or provisional order authorising supply within the local authority's area.<sup>3</sup> Procedure by means of special order made by the Electricity Commissioners has now superseded the method of licence or provisional order.<sup>4</sup> A local authority with the approval of the Minister of Transport may make bye-laws for securing public safety.<sup>5</sup> Detailed provision is made in the Clauses Act of 1899 in regard to such matters as the opening of streets,<sup>6</sup> and interference with pipes and sewers.<sup>7</sup> Local authorities may requisition supplies for public lighting,<sup>8</sup> and may appoint inspectors.<sup>9</sup>

#### SUBSECTION (3).—*Purchase of Undertakings.*

**315.** On the expiry of forty-two years or such shorter period as may be specified in an order or special act authorising supply in any area, the local authority may acquire any undertaking (except the undertaking of a joint electricity authority),<sup>10</sup> or so much thereof as lies within their area, at its then value.<sup>11</sup> With the consent of the local authority, the powers of purchase may be suspended by order of the Commissioners.<sup>12</sup> The right to purchase may be transferred to a joint electricity authority by the order constituting such an authority.<sup>13</sup> In order to encourage applications for distribution orders extending over wide areas, provision is now made that where a special order made after 15th December 1926 authorises supply in an area which (a) comprises the whole of the districts of two or more local authorities, and (b) is in the opinion of the Commissioners adequate in extent, the undertakers' tenure may be extended to fifty years, and the basis of purchase will be capital cost less depreciation. Further, the whole undertaking, and not merely a part, must be taken, the purchasing authority being the joint electricity authority (if any), or all the local authorities concerned acting jointly.<sup>14</sup> An order made in

<sup>1</sup> 1909, s. 8. The only Scottish example is afforded by the Ayrshire Electricity Board which was set up in 1924.

<sup>2</sup> See ss. 328 and 329.

<sup>5</sup> 1882, s. 6.

<sup>8</sup> *Ibid.*, ss. 24, 26, 29, 34.

<sup>11</sup> 1888, ss. 2, 3; 1909, s. 7; *Manchester Carriage Co. v. Swinton U. D. C.*, [1906] A.C. at p. 279; *Oldham Electric Tramways v. Ashton Corporation*, [1921] 3 K.B. 511; *Edinburgh Street Tramways v. Edinburgh Mags.*, [1894] A.C. 456.

<sup>12</sup> 1922, s. 14.

<sup>13</sup> 1919, s. 13 (2).

<sup>3</sup> 1882, ss. 3, 4; 1888, s. 1; 1909, s. 9.

<sup>6</sup> 1889, ss. 16, 17; see also 1909, s. 3.

<sup>9</sup> *Ibid.*, ss. 35 *et seq.*

<sup>4</sup> 1919, s. 26.

<sup>7</sup> 1899, s. 18.

<sup>10</sup> 1919, s. 12 (2).

<sup>14</sup> 1926, s. 39 (1).

these special circumstances may provide<sup>1</sup> that a prescribed relation must be preserved between divisible profits and price charged for electricity; and this provision may go far towards defeating the objects of the section. Undertakers who do not generate but rely on bulk supplies, are entitled in the event of purchase to a suitable allowance in respect of plant thrown out of use by the adoption of such bulk supply.<sup>2</sup> At any time within ten years of the date of purchase undertakers may now, with the consent of the Electricity Commissioners, vary by agreement with the local authority the terms of purchase.<sup>3</sup>

#### SECTION 4.—AUTHORISED UNDERTAKERS.

**316.** The expression “authorised undertaker” is the generic term used to describe local authorities, companies, or persons empowered by special order or statute to supply electricity for public purposes.<sup>4</sup> “Authorised undertakers” fall into two classes, viz. “authorised distributors” and “power companies.” An “authorised distributor” is a local authority, company, or person (other than a “power company”) authorised to supply electricity within any area of supply.<sup>4</sup> A “power company” is a company or person (other than a railway company operating a private generating station) authorised by special act to supply to authorised distributors and lighting authorities or to other persons for power purposes.<sup>4</sup> A power company may enjoy distribution powers; but, broadly speaking, the authorised distributor is exclusively a retailer, while the power company engages in both the retail and the wholesale supply of energy, its principal customer being the retail power consumer.

#### SUBSECTION (1).—*Authorised Distributors.*

##### (i) *The Special Order.*

**317.** The method of obtaining authority to supply electricity for public or private purposes was formerly by licence<sup>5</sup> (long since obsolete) or Provisional Order.<sup>6</sup> Since 1919 the procedure is almost invariably by way of Special Order made by the Electricity Commissioners, confirmed by the Minister of Transport, and submitted to both Houses of Parliament.<sup>7</sup> Procedure by way of Special Order is usually adopted for the purpose of obtaining distribution powers; but under the Acts Special Orders may be made for a variety of other purposes.<sup>8</sup>

A typical distribution Order contains only the following sections, viz. (1) the incorporation of the *Clauses Act of 1899* in whole or with specified

<sup>1</sup> 1926, s. 39 (2).

<sup>2</sup> *Ibid.*, s. 40.

<sup>3</sup> *Ibid.*, s. 41.

<sup>4</sup> 1919, s. 36.

<sup>5</sup> 1882, s. 3.

<sup>6</sup> *Ibid.*, s. 4. The old procedure is fully explained in Constable, Beveridge and Macmillan, *Provisional Orders*, ch. vi.

<sup>7</sup> 1919, ss. 26, 32, and 35.

<sup>8</sup> See, e.g., 1882, s. 4; 1909, ss. 1, 3, 4 (1), 5 (2), 7 (1), and 8; 1919, ss. 12 (1), 15, 26, and 32 (3); 1922, ss. 14, 15, and 17 (1); and 1926, ss. 6 (2) and 42 (2).



exceptions; (2) specification of the undertakers;<sup>1</sup> (3) definition of the area of supply; (4) authority to break up enumerated streets; (5) specification of compulsory distributing mains; (6) provision as to maximum prices; (7) in the case of a company undertaker, the amount of the deposit under s. 5 of the *Clauses Act*; (8) the date of commencement of the Order; and (9) protective clauses. The detailed procedure will be found in S.R.O., 1920, No. 1461.

## (ii) *Powers and Duties.*

**318.** Undertakers are empowered generally to supply electricity within their area,<sup>2</sup> and to construct works and do everything necessary and incidental to such supply.<sup>3</sup> Compulsory powers for the acquisition of land required for a generating station may be acquired under the *Act of 1909*.<sup>4</sup> The *Clauses Act of 1899* contains elaborate provisions as to the conditions to be observed in regard to the breaking up of streets, and interference with pipes and wires, and for the protection of the Postmaster-General and others.<sup>5</sup> The system of supply is subject through Electricity Inspectors<sup>6</sup> to the control of the Electricity Commissioners, who have wide powers to secure the public safety,<sup>7</sup> and may insist not only upon the repair of defects, but also upon an alteration in type of current, frequency, or pressure.<sup>8</sup>

**319.** In order to facilitate the exercise by undertakers of their general powers, special authority may be obtained to abstract water from any source for condensing purposes;<sup>9</sup> or to erect overhead lines across any land not covered by buildings or used as a garden or pleasure ground;<sup>10</sup> or to lop trees or hedges obstructing electric lines.<sup>11</sup> Further, power may be obtained to supply in bulk, and such supply may be made compulsory,<sup>12</sup> and, pending the establishment of a joint electricity authority, two or more undertakers may be not only empowered but required to carry into effect arrangements for mutual assistance in the giving and taking of supplies, the distribution of the supplies so taken, and the working of generating stations.<sup>13</sup> Since 1919 the consent of the Electricity Commissioners has been necessary to the establishment by undertakers of a new, or the extension of an existing, generating station.<sup>14</sup>

**320.** The primary obligation imposed upon undertakers is to construct within two years the compulsory mains specified in their Special

<sup>1</sup> If the undertakers are to be a company, they must be incorporated under the *Companies Acts* or by Special Act.

<sup>2</sup> 1882, s. 10.

<sup>3</sup> *Attorney-General v. County of London Electric Co.*, [1926] 1 Ch. 542.      <sup>4</sup> Sec. 1.

<sup>5</sup> 1899, ss. 11–20; see *Postmaster-General v. Blackpool Tramways*, [1921] 1 K.B. 114; *Postmaster-General v. Liverpool Corporation*, [1923] A.C. 587.

<sup>6</sup> 1899, ss. 35 *et seq.*

<sup>7</sup> *Ibid.*, s. 69.

<sup>8</sup> 1919, s. 24.

<sup>9</sup> *Ibid.*, s. 15 (1); 1926, Sched. vi.; see *Metropolitan Water Board v. Minister of Transport*, 1925, 42 T.L.R. 165.

<sup>10</sup> 1919, s. 22; 1926, s. 44.

<sup>11</sup> 1926, s. 34.

<sup>12</sup> 1909, s. 4.

<sup>13</sup> 1919, s. 19; see also *Ealing Borough Council*, 1922, 38 T.L.R. 833; and 1922, s. 13 (b).

<sup>14</sup> 1919, s. 11; 1922, s. 13 (a); *Attorney-General v. Ealing Corporation*, [1924] 2 Ch. 545.



Order.<sup>1</sup> Ordinarily undertakers voluntarily construct a distribution network far exceeding in extent the prescribed compulsory mains; but they may be required to lay mains in any street on a requisition by owners or occupiers or the lighting authority, provided the requisition is supported by a guaranteed demand of specified amount.<sup>2</sup> The undertakers must afford a supply to premises within 50 yards of a main on the request of private consumers who comply with specified conditions designed to guarantee a remunerative demand;<sup>3</sup> but a stand-by supply need only be given under an agreement by the consumer to pay a minimum annual sum to cover standing charges and provide a reasonable return on capital expenditure.<sup>4</sup> A supply must also be afforded for street lighting up to a distance of 75 yards from a main, the charge being fixed, failing agreement, by arbitration.<sup>5</sup> Failure to supply, except when due to *force majeure*<sup>6</sup> or inevitable accident, involves the undertakers in penalties.<sup>7</sup> Supply to individual premises beyond the limits of the undertakers' area is frequently authorised by means of "fringe orders" made by the Electricity Commissioners under the Act of 1909;<sup>8</sup> and supply may on certain conditions be given within the area to a railway, canal, or similar undertaking for use outside the area.<sup>9</sup>

### (iii) *Methods of Charge and Maximum Prices.*

**321.** The undertakers may charge (1) by the actual amount of energy supplied; (2) by the electrical quantity contained in the supply; or (3) by such other method as may be approved by the Commissioners;<sup>10</sup> and the charge may include (a) a periodical fixed or service charge, covering *inter alia* a charge for any fittings or apparatus supplied to the consumer, and (b) a charge for the energy supplied.<sup>11</sup> No undue preference may be shewn to any consumers.<sup>12</sup> The maximum prices chargeable are those scheduled to the Special Order,<sup>13</sup> the basis of charge being the Board of Trade unit. The maximum prices are subject to triennial revision on the application to the Minister of Transport of (a) the undertakers; (b) twenty consumers; or (c) the local authority.<sup>14</sup> In addition to utilising ordinary methods of recovering charges,<sup>15</sup> undertakers may cut off the supply to a defaulting consumer,<sup>16</sup> and charge him with the cost of re-connecting.<sup>17</sup>

<sup>1</sup> 1899, s. 21.

<sup>2</sup> *Ibid.*, ss. 21, and 24-26.

<sup>3</sup> *Ibid.*, s. 27.

<sup>4</sup> 1922, s. 23.

<sup>5</sup> 1899, ss. 29 and 34.

<sup>6</sup> *Hackney Borough Council v. Doré*, [1922] 1 K.B. 431.

<sup>7</sup> 1899, s. 30. Damages may be due instead of penalties: *Clegg, Parkinson & Co. v. Earby Gas Co.*, [1896] 1 Q.B. 592; *Morris & Bastert v. Loughborough Corporation*, [1908] 1 K.B. 205.

<sup>8</sup> Sec. 6.

<sup>9</sup> 1909, s. 5; 1926, s. 47.

<sup>10</sup> 1899, s. 31.

<sup>11</sup> 1926, s. 42.

<sup>12</sup> 1882, ss. 19, 20; see also *Metropolitan Electric Supply Co. v. Ginder*, [1901] 2 Ch. 799; *Newcastle Electric Supply Co.*, 1911, 9 L.G.R. 161; *Attorney-General for Victoria v. Melbourne Corporation*, [1907] A.C. 469; *Attorney-General v. Long Eaton Urban District Council*, [1915] 1 Ch. 124; *Attorney-General v. Hackney Borough Council*, [1918] 1 Ch. 372.

<sup>13</sup> 1899, s. 32. In the special circumstances dealt with by 1926, s. 39, a sliding scale may be provided to regulate the relation of price to dividend.

<sup>14</sup> 1922, Sched.

<sup>15</sup> 1882, s. 12.

<sup>16</sup> *Ibid.*, s. 21.

<sup>17</sup> 1926, s. 45.

The accounts of undertakers must be kept in prescribed form,<sup>1</sup> and are subject to audit.<sup>2</sup>

(iv) *Revocation of Special Order.*

**322.** The Minister of Transport may revoke an Order by consent,<sup>3</sup> or where the undertakers are insolvent,<sup>4</sup> or cannot carry on their business with a profit.<sup>5</sup> The same consequence may follow failure on the part of the undertakers to execute their powers<sup>6</sup> or to comply with certain requirements of the Electricity Commissioners,<sup>7</sup> or infringement of the conditions of the Special Order, *e.g.* by trespassing beyond the area of supply.<sup>8</sup>

SUBSECTION (2).—*Power Companies.*<sup>9</sup>

(i) *Power Acts.*

**323.** Power Companies are “undertakers” under the Act of 1882,<sup>10</sup> and “authorised undertakers” within the meaning of the Act of 1919.<sup>11</sup> Their private acts are “special acts” for the purposes of the Clauses Act of 1899 and of the Electricity (Supply) Acts. They thus present many of the characteristics of an ordinary electricity undertaker, and their peculiar features may best be examined by briefly reviewing a typical “Power Act.”<sup>12</sup>

The Act incorporates suitable portions of the Companies Clauses Act, the Lands Clauses Act, and the Electricity Acts, and provides for the incorporation, management, and finance of the company. Where additional capital is required for the purposes of a scheme under the Act of 1926, the necessary powers can be secured without application to Parliament by petition to the Court of Session.<sup>13</sup> Provision is made for the acquisition of land, the erection of generating stations, the construction of all necessary works (subject to a time limit on the expiry of which powers not exercised will lapse), and the delimiting of an area of supply which is usually much more extensive than the area of a distribution company. The central sections of the Act are those dealing with (a) the company’s power and obligation to supply, and (b) maximum prices and their relation to dividends.

(ii) *Power and Obligation to Supply.*

**324.** The powers of the company for the supply of energy are defined in a model clause known as the “Kitson clause,”<sup>14</sup> which authorises (a) supply in bulk to authorised distributors, and (b) supply for power purposes to any person. The power consumer may utilise the energy for lighting the premises on which the power is used, but, with this exception,

<sup>1</sup> 1882, s. 9; 1909, s. 12; 1919, s. 27.

<sup>3</sup> 1899, s. 66.

<sup>4</sup> *Ibid.*, s. 63.

<sup>2</sup> 1882, s. 8; 1899, s. 6.

<sup>5</sup> *Ibid.*, s. 23 (3).

<sup>7</sup> *Ibid.*, ss. 5 (3), 69 (3).

<sup>5</sup> *Ibid.*, s. 64.

<sup>8</sup> *Ibid.*, s. 4 (3).

<sup>9</sup> See para. 306, *supra*, for history and definition.

<sup>10</sup> Sec. 2.

<sup>11</sup> Sec. 36.

<sup>12</sup> *E.g.* The Lothians Electric Power Act, 1904 (4 Edw. VII. c. 207).

<sup>13</sup> 1926, s. 16 (3).

<sup>14</sup> See, *e.g.*, s. 39 of the Lothians Act.

the company may not supply for lighting purposes. The company is usually made subject to the provisions of any Act or Order creating authorised distributors within the company's area of supply which are in existence at the date of the power Act, and the company may not supply within the area of existing authorised distributors except with their consent, which consent must not be unreasonably withheld, and may be dispensed with by the Minister of Transport. Under the 1926 scheme, the Board cannot supply *directly* within a power company's area, without the power company's consent, unless the undertakers demanding a supply have an "absolute right of veto"<sup>1</sup> against the power company, or unless the power company are unwilling or unable to give the supply on reasonable terms.<sup>2</sup> But the Board can always give an *indirect* supply through the power company.<sup>3</sup>

**325.** The obligation to supply in bulk to authorised undertakers requiring such a supply is peremptory, but is hedged by various conditions, of which the most important is that the authorised undertaker must enter into a contract to receive and pay for a supply for seven years on such terms as will provide the power company with a return equivalent to 20 per cent. per annum on the outlay incurred in providing the supply.

The ordinary power consumer, in order to qualify for a compulsory supply, must enter into a contract on such terms as, failing agreement, may be fixed by arbitration.

### (iii) *Maximum Prices and Dividends.*

**326.** The maximum prices chargeable by the power company are scheduled to the power Act, and are usually made subject to revision by the Minister of Transport at intervals of ten years upon the application of the company or of a specified number of undertakers or power consumers. The period of revision has now been reduced to three years, and the conditions of revision have been modified, by the Act of 1922.<sup>4</sup> Further, in the event of a power company commencing to receive a supply from the Central Electricity Board, a revision of maximum and standard prices may be effected at the instance of the Minister of Transport.<sup>5</sup>

**327.** The "standard dividend" payable by a power company is usually limited to 8 per cent.; and a sliding scale is provided by reference to which the company may distribute more or less than the "standard dividend" according as the prices for each year fall short of or exceed a "standard price," usually fixed at 2½d. per unit. The power company may in subsequent years make good previous deficiencies; but under the operation of the Act of 1926 this power may be withdrawn.<sup>6</sup>

<sup>1</sup> 1926, s. 51 (1).

<sup>2</sup> *Ibid.*, s. 10.

<sup>3</sup> *Ibid.*, ss. 12, 51 (2).

<sup>4</sup> Sec. 22 (3) and Sched.

<sup>5</sup> 1926, s. 31 (1); see also *ibid.*, s. 12.

<sup>6</sup> *Ibid.*, s. 31 (2). The power has never in fact been exercised. The standard price may be revised under 1926, s. 31 (1).



SUBSECTION (3).—*Local Authority Undertakers.*

**328.** Various special provisions have been made applicable to local authority undertakers as distinguished from company undertakers. Specific directions are given as to the application of all moneys received by a local authority,<sup>1</sup> and, with a view to safeguarding the position of the consumer, payments in aid of the local rate may now be made (a) only up to a limit equivalent to  $1\frac{1}{2}$  per cent. of the outstanding debt of the undertaking, and (b) after 1930 only if the reserve fund exceeds one-twentieth of the aggregate capital expenditure.<sup>2</sup> If the net annual surplus exceeds 5 per cent. on the total capital expenditure, charges fall to be reduced.<sup>1</sup> Since 1922 the provisions as to triennial revision of maximum prices have been made applicable to local authorities.<sup>3</sup> Prior to 1919, local authorities could not without statutory authority deal in electrical fittings and apparatus.<sup>4</sup> By the Act of 1919, power was given to provide, hire, connect, repair, and maintain fittings;<sup>5</sup> and by the Act of 1926 power was further given under detailed conditions to sell fittings to consumers and contractors at recognised retail prices, but not to manufacture such goods.<sup>6</sup> For the purposes of the finance of the 1926 scheme special directions are given as to the allowance to a local authority for interest and depreciation under Schedules II. and III. of the Act.<sup>7</sup>

**329.** A local authority, with the consent of the Electricity Commissioners,<sup>8</sup> may borrow on the security of the local rate, and may issue stock.<sup>9</sup> The maximum period for repayment is sixty years.<sup>10</sup> Sinking fund payments may be suspended for the period during which the capital expenditure is unremunerative up to a limit of five years.<sup>11</sup>

A joint board of two or more local authorities may be set up by order of the Minister of Transport, with the concurrence of the Secretary of State for Scotland, where it appears expedient that their powers under the Acts should be exercised jointly.<sup>12</sup>

## SECTION 5.—UNAUTHORISED UNDERTAKERS.

SUBSECTION (1).—*Public Suppliers.*

**330.** Statutory powers are not an essential prerequisite to the giving of a supply of electricity, and there are many small unauthorised undertakings, though their operations are, of course, narrowly circumscribed

<sup>1</sup> 1899, Sched., s. 7; see *Attorney-General v. Ealing Corporation*, [1924] 2 Ch. 545.

<sup>2</sup> 1926, s. 43 and Sched. V.

<sup>3</sup> 1922, s. 22 (2) and Sched.

<sup>4</sup> *Attorney-General v. Leicester Corporation*, [1910] 2 Ch. 359; *Attorney-General v. Sheffield Corporation*, 1912, 28 T.L.R. 266.

<sup>5</sup> Sec. 23; see also *Attorney-General v. Liverpool Corporation*, [1922] 1 Ch. 211.

<sup>6</sup> 1926, s. 48.

<sup>7</sup> As to transfer of a local authority undertaking, see *Birkdale Electric Co. v. Southport Corporation*, [1926] A.C. 355.

<sup>8</sup> 1919, s. 20.

<sup>9</sup> 1882, s. 8; 1902, s. 1; 1909, s. 21; 1919, s. 19; 1922, s. 5.

<sup>10</sup> 1922, s. 29.

<sup>11</sup> *Ibid.*, s. 2.

<sup>12</sup> 1909, ss. 8 and 26. The Ayrshire Electricity Board was constituted under these sections in 1924.



by the impossibility of breaking up streets, or compulsorily acquiring wayleaves for overhead lines or underground cables in private property. So far as public safety and the interests of the Post Office are affected, unauthorised systems are subject to control by the Electricity Commissioners and the Postmaster-General.<sup>1</sup> Further substantial extensions of unauthorised undertakings were prevented by the Act of 1909, which enacted that it should be unlawful except under the powers of an Act, Order, or licence, to commence to supply or distribute within the area of a statutory undertaker.<sup>2</sup>

#### SUBSECTION (2).—*Private Generating Stations.*

**331.** A private generating station is a station generating electricity for use solely or mainly on the premises of the owners or for the purposes of their own undertaking.<sup>3</sup> Notwithstanding the general prohibition in s. 11 of the Act of 1919, it is permissible to establish new private stations without consent of the Electricity Commissioners, subject, however, to an obligation to comply with regulations as to type of current, frequency, and pressure.<sup>4</sup> Private stations cannot be "selected" under the Act of 1926 without their owners' consent, nor can the owners be compelled to enter into temporary arrangements under the scheme nor to transfer to the Board any of their main transmission lines.<sup>5</sup>

#### SUBSECTION (3).—*Railway Supplies.*

**332.** The provisions affecting the use of electrical power for railway traction properly form part of the law relating to railways, the principal Acts being the Railways (Electrical Power) Act, 1903,<sup>6</sup> and the Railways Act, 1921.<sup>7</sup> The subject is, however, touched upon in the Electricity (Supply) Acts. A joint electricity authority or power company may supply a railway company within their area with electricity which may be used in any part of the railway system for traction or lighting of vehicles.<sup>8</sup> Other undertakers before giving such a supply must obtain the consent of the Electricity Commissioners.<sup>9</sup> A Special Order was formerly necessary before supplies could be given to the Railway Company to be used for purposes other than those above mentioned,<sup>9</sup> but the consent of the Minister of Transport is all that is now required.<sup>10</sup> Consent to the establishment of a new, or the extension of an existing, railway generating station cannot be withheld unless it is proved that an adequate and equally cheap alternative supply can be given by a joint electricity authority or by authorised undertakers.<sup>11</sup> With the approval of the

<sup>1</sup> 1888, s. 4.

<sup>2</sup> 1909, s. 23; see also *Southport Corporation v. Attorney-General*, [1924] A.C. 909; and *Caerphilly Urban District Council v. Griffin*, [1927] W.N. 324.

<sup>3</sup> 1919, s. 36.

<sup>4</sup> *Ibid.*, s. 11.

<sup>5</sup> 1926, s. 4.

<sup>6</sup> 3 Edw. VII. c. 30.

<sup>7</sup> 11 & 12 Geo. V. c. 55, s. 16.

<sup>8</sup> 1922, s. 24; see also 1919, s. 12 (1).

<sup>9</sup> 1909, s. 5.

<sup>10</sup> 1926, s. 47

<sup>11</sup> 1919, s. 11.

Electricity Commissioners, and subject to obtaining the consents of the undertakers whose areas may be invaded, surplus generating plant belonging to a railway company may be utilised in giving a supply to joint electricity authorities, authorised undertakers, or ordinary consumers.<sup>1</sup> Under the Act of 1926,<sup>2</sup> the frequency of a supply used on a railway can only be altered under the procedure prescribed in the Railways Act, 1921, s. 16.<sup>3</sup> A railway generating station cannot be "selected" for the purposes of a scheme under the Act of 1926 without the owners' consent.<sup>4</sup> One railway may, with the consent of the Electricity Commissioners, supply electricity to another.<sup>5</sup>

#### SECTION 6.—LIABILITIES OF UNDERTAKERS.

**333.** Sec. 81 of the Clauses Act of 1899 provides that nothing in the Special Order shall exonerate the undertakers from any indictment, action, or other proceeding for nuisance in the event of any nuisance being caused or permitted by them. In the case of undertakings to which this provision applies, the undertakers are liable to interdict or damages if they cause a nuisance, irrespective of negligence. Where, however, specific statutory authority has been obtained to construct and operate certain works, without a "nuisance" clause, the undertakers will only be liable for negligence, or on the principle of *Rylands v. Fletcher*.<sup>6</sup> Where authority has been granted subsequently to 23rd December 1919 for the use of any land for the purposes of a generating station, the only remedy available to aggrieved parties is damages, interdict being declared incompetent.<sup>7</sup> The undernoted cases illustrate the basis on which claims are usually laid against electricity undertakers,<sup>8</sup> the common forms of injury or damage being by fire, explosion, or poisoning by gas or fumes from fused cables.

#### SECTION 7.—JOINT ELECTRICITY AUTHORITIES.

##### SUBSECTION (1).—*Constitution of Electricity Districts.*

**334.** Joint Electricity Authorities were first introduced by the Act of 1919, which was subsequently amended in various details by the Act of 1922. The cumbrous and tedious procedure of the Act of 1919<sup>9</sup> was greatly simplified by the Act of 1926,<sup>10</sup> which provided that, when satisfied of the desirability of the step, the Electricity Commissioners, after consultation with the authorised undertakers concerned, may

<sup>1</sup> 1922, s. 25.

<sup>2</sup> 1926, s. 9 (5).

<sup>3</sup> 11 and 12 Geo. V. c. 55.

<sup>4</sup> 1926, s. 4 (1).

<sup>5</sup> *Ibid.*, s. 46.

<sup>6</sup> 1868 L.R. 3 H.L. 330.

<sup>7</sup> 1919, s. 10.

<sup>8</sup> *Goodbody v. Poplar Borough Council*, 1915, 84 L.J. (K.B.) 1230; *Charing Cross Co. v. Hydraulic Power Co.*, [1914] 3 K.B. 772; *Midwood v. Manchester Corporation*, [1905] 2 K.B. 597; *Colwell v. St. Pancras Borough Council*, [1904] 1 Ch. 707; *Demerara Electric Co. v. Whyte*, [1907] A.C. 330; *Geddis v. Bann Reservoir*, 1878, 3 App. Cas. 430, at p. 455; *Giblin v. Middle Ward District Committee*, 1927 S.L.T. 563.

<sup>9</sup> Sec. 5, and 1922, s. 19.

<sup>10</sup> Sec. 36.

constitute in any area an "electricity district," formulate a scheme for improving the organisation of the supply of electricity, and establish a joint electricity authority for the district.<sup>1</sup> A local inquiry is held at which all parties interested are entitled to make representations on the proposed scheme. The joint electricity authority is representative of the authorised undertakers within the district, with or without the addition of representatives of local authorities, large consumers, or other interests.<sup>2</sup> The scheme, which may provide for the exercise by the joint electricity authority of the powers of the authorised undertakers, for the execution of necessary works, for the subsequent alteration of the authority's constitution,<sup>3</sup> and (with the owner's consent) for the transfer to the authority of any undertaking, must be confirmed by the Minister of Transport and approved by both Houses of Parliament.<sup>2</sup>

#### SUBSECTION (2).—*Powers and Duties.*

**335.** The general duty of a joint electricity authority is to provide, or secure the provision of, a cheap and abundant supply of electricity within their district,<sup>4</sup> either by themselves exercising the powers of undertakers within the meaning of the Acts,<sup>5</sup> or by operating through authorised undertakers.<sup>6</sup> With the consent of the Electricity Commissioners, a joint electricity authority may acquire outright any undertaking,<sup>7</sup> and any generating station or main transmission line,<sup>8</sup> and may dispose of stations and works not required,<sup>9</sup> or arrange for their operation by the former owners;<sup>10</sup> or they may take on lease any undertaking,<sup>11</sup> or acquire the right to the use of a main transmission line;<sup>12</sup> or they may by agreement utilise or dispose of water power, waste heat, or other forms of energy and may erect and maintain by-product plant.<sup>13</sup> They may,<sup>14</sup> and, if required by the Commissioners, they must<sup>15</sup> supply electricity within the district, but not within the areas of authorised distributors<sup>16</sup> or power companies<sup>17</sup> without the latter's consent. The Ministry of Transport, on the recommendation of the Commissioners, may dispense with the consent of authorised distributors, if unreasonably withheld;<sup>17</sup> and the Commissioners may on stated conditions authorise supply within a power company's area,<sup>18</sup> or alter their area.<sup>19</sup> Under the 1926 Act, the joint electricity authority for the district (if any) have the first opportunity of acquiring a "selected station" where the owners are in default,<sup>20</sup> or of operating such a station when acquired by the Board.<sup>21</sup> Joint electricity authorities also enjoy the same powers as local authority undertakers in regard to hiring, connecting, and selling fittings.<sup>22</sup>

<sup>1</sup> *Rex v. Electricity Commissioners*, [1924] 1 K.B. 171, provides an example of an *ultra vires* scheme.

<sup>2</sup> 1919, s. 6.

<sup>3</sup> 1926, s. 37.

<sup>4</sup> 1919, s. 8.

<sup>5</sup> *Ibid.*, s. 12 (2).

<sup>6</sup> 1922, s. 15.

<sup>7</sup> 1919, s. 13.

<sup>8</sup> *Ibid.*, s. 9.

<sup>9</sup> 1922, s. 10.

<sup>10</sup> *Ibid.*, s. 16.

<sup>11</sup> *Ibid.*, s. 6.

<sup>12</sup> *Ibid.*, s. 9.

<sup>13</sup> 1919, s. 15.

<sup>14</sup> *Ibid.*, s. 12 (1).

<sup>15</sup> *Ibid.*, s. 12 (3).

<sup>16</sup> *Ibid.*, s. 12 (1) (a); 1922, s. 16.

<sup>17</sup> 1919, s. 12 (1) (b); 1922, s. 16.

<sup>18</sup> 1922, s. 16.

<sup>19</sup> *Ibid.*, s. 17.

<sup>20</sup> 1926, s. 5 (2).

<sup>21</sup> *Ibid.*, s. 5 (3).

<sup>22</sup> 1919, s. 23; 1926, s. 48.



SUBSECTION (3).—*Finance.*

**336.** The joint electricity authority must establish a fund to which all receipts are carried and from which all payments are made,<sup>1</sup> and must annually submit accounts and a report to the Electricity Commissioners.<sup>2</sup> Prices should be so fixed as to balance income and expenditure with such margin as the Commissioners may allow.<sup>3</sup> With the consent of the Commissioners and subject to regulations, they may borrow to meet specified classes of capital expenditure,<sup>4</sup> and may issue stock;<sup>5</sup> and contributions to sinking fund may be suspended during the unremunerative period up to a limit of five years.<sup>6</sup> The limit for repayment is sixty years,<sup>4</sup> but much shorter periods are usually fixed by the Commissioners. Authorised undertakers may give financial assistance to a joint electricity authority within whose district their areas are situated by lending money, subscribing for securities, or guaranteeing payment of interest.<sup>7</sup> The cost is defrayed in the case of county councils out of the general purposes rate, and in the case of town councils out of the public health general assessment.<sup>8</sup> It is possible that under the 1926 scheme joint electricity authorities will diminish in importance, and it is improbable that many more will be established.

## SECTION 8.—SCHEMES UNDER THE ACT OF 1926.

SUBSECTION (1).—*The Central Electricity Board.*

**337.** The Central Electricity Board are the executive authority for the purposes of the Act of 1926, though most of their functions are performed not directly but by delegation to existing undertakers and others. The Board consists of a chairman and seven members appointed by the Minister of Transport in consultation with representatives of local government, electricity, commerce, industry, transport, agriculture, and labour.<sup>9</sup> The Board are a body corporate<sup>10</sup> with a common seal, and with power to appoint a secretary and other officers,<sup>11</sup> and also consultative technical committees composed of engineers employed in connection with "selected stations."<sup>12</sup> The general duty with which the Board are charged is to supply electricity to authorised undertakers in accordance with the provisions of the Act, *i.e.* (in the normal case) by means of the "grid" and "selected stations" operated by authorised undertakers.<sup>13</sup> In certain conditions the Board may give supplies to persons who are not authorised undertakers.<sup>14</sup> In exceptional cases only, the Board may themselves generate electricity.<sup>15</sup> The Board may *not* delegate their powers<sup>16</sup> in relation to (a) "selected stations" unless the owners consent,<sup>17</sup> nor (b) the adoption of schemes,<sup>18</sup> nor (c) the fixing of tariffs;<sup>19</sup> but with

<sup>1</sup> 1919, s. 28 (1).<sup>2</sup> *Ibid.*, s. 28 (2) to (4).<sup>3</sup> 1922, s. 18.<sup>4</sup> *Ibid.*, s. 1.<sup>5</sup> *Ibid.*, s. 3.<sup>6</sup> *Ibid.*, s. 2.<sup>7</sup> *Ibid.*, s. 5.<sup>8</sup> *Ibid.*, s. 30.<sup>9</sup> 1926, s. 1 (1).<sup>10</sup> *Ibid.*, s. 1 (6) and (10).<sup>11</sup> *Ibid.*, s. 1 (9).<sup>12</sup> *Ibid.*, s. 3.<sup>13</sup> *Ibid.*, s. 2.<sup>14</sup> *Ibid.*, s. 20 (3).<sup>15</sup> *Ibid.*, ss. 5 (3) and 6 (3).<sup>16</sup> *Ibid.*, s. 2 (4).<sup>17</sup> *Ibid.*, ss. 5 and 7.<sup>18</sup> *Ibid.*, s. 4 (2).<sup>19</sup> *Ibid.*, s. 11.



these exceptions the Board may leave the administration of a scheme under local control by delegating any of their powers (a) to authorised undertakers<sup>1</sup> or (b) to an association of owners of "selected stations,"<sup>2</sup> whether such owners are authorised undertakers or not. The Board are deemed to be undertakers and authorised undertakers within the meaning of the Electricity Supply Acts, and the Act of 1899 applies to them with such modifications as the Electricity Commissioners may prescribe.<sup>3</sup>

#### SUBSECTION (2).—*Preparation of Schemes.*

**338.** The central feature of the Act is the provision of an official "grid" of main transmission lines covering the whole country, and fed by "selected stations" of high efficiency operated at a standard frequency. This undertaking will be carried out in stages over a long period of years, in conformity with schemes prepared under the Act. The duty of formulating schemes is imposed on the Electricity Commissioners.<sup>4</sup> The scheme for each area must (a) determine which stations (existing or new) are to be the "selected stations" at which electricity is to be generated for the Board;<sup>5</sup> (b) provide for interconnection of selected stations one with another, and with the systems of authorised undertakers, and for interlinking of areas;<sup>6</sup> and (c) provide, where necessary, for standardisation of frequency.<sup>7</sup> The scheme should also contain suitable provisions for temporary arrangements to be in force during the execution of the works.<sup>8</sup> Railway generating stations,<sup>9</sup> stations operated by canal or dock authorities, and private generating stations<sup>9</sup> (unless with the owners' consent), cannot be included as "selected stations."<sup>10</sup> The Board, on receiving a scheme from the Electricity Commissioners, publish it, invite representations from "authorised undertakers and other persons interested," and after considering the scheme and representations, and (if need be) holding inquiries, they adopt the scheme with or without modifications, and again publish it as adopted.<sup>11</sup> Thereupon authorised undertakers aggrieved by the obligations imposed on them by the scheme may require the Board, unless they amend the scheme so as to remove the complaint, to refer the matter to an arbitrator selected from panels of barristers and advocates.<sup>12</sup> The arbitrator, with or without assistance from technical assessors, may either (a) amend the scheme, unless the Board certify that such relief would conflict with the basic principles of the scheme or would prejudicially affect its efficiency, or (b) award pecuniary compensation.<sup>13</sup> The same procedure applies to subsequent amendments of a scheme; but a "selected station" cannot be "de-selected" without the owner's consent.<sup>14</sup>

<sup>1</sup> 1926, s. 2 (2).

<sup>4</sup> *Ibid.*, s. 4 (1).

<sup>7</sup> *Ibid.*, s. 4 (1) (c).

<sup>10</sup> 1926, s. 4 (1).

<sup>13</sup> *Ibid.*, s. 4 (4).

<sup>2</sup> *Ibid.*, s. 2 (3).

<sup>5</sup> *Ibid.*, s. 4 (1) (a).

<sup>8</sup> *Ibid.*, s. 4 (d).

<sup>11</sup> *Ibid.*, s. 4 (2).

<sup>14</sup> *Ibid.*, s. 4 (5).

<sup>3</sup> *Ibid.*, s. 20.

<sup>6</sup> *Ibid.*, s. 4 (1) (b).

<sup>9</sup> 1919, s. 36.

<sup>12</sup> *Ibid.*, s. 4 (3).

SUBSECTION (3).—*Execution of Schemes.*(i) *Selected Stations.*

**339.** In the case of *existing* selected stations, the Board must endeavour to arrange with the owners for the stations being operated in accordance with the Act, and for such extensions and alterations as may be necessary in the view of the Board and of the Electricity Commissioners.<sup>1</sup> Disputes in regard to the latter point are referable to arbitration.<sup>1</sup> In the event of the owners proving recalcitrant or failing in their duties, they will be deprived of their station by order of the Minister of Transport in exchange for a sum ascertained (if necessary by arbitration) on the basis of capital cost less depreciation.<sup>2</sup> If such a station is situated in an "electricity district" the joint electricity authority have the first option to acquire it. Failing the joint electricity authority, the Board must endeavour to find a suitable purchaser in some "authorised undertaker or other company or person." In the last resort the Board may themselves acquire and operate the station; but the Act plainly contemplates that this is an emergency step.<sup>3</sup> In the case of *new* "selected stations," the Board must endeavour to arrange for the provision of the station by an authorised undertaker.<sup>4</sup> If they satisfy the Commissioners that they cannot make such an arrangement, the Board (or any company or person) may be authorised by special order to provide the station,<sup>5</sup> but the Board may not themselves operate the station unless they satisfy the Commissioners that they are unable to arrange for the delegation of this duty on reasonable terms.<sup>6</sup>

(ii) *Rights and Duties of Owners of Selected Stations.*

**340.** After a date fixed by the Board, all selected stations are operated under their direction.<sup>7</sup> The entire output must be sold to the Board, and the owners may buy back from the Board so much of the electricity generated at the selected station as is required for their own undertaking.<sup>8</sup> Failing agreement, the price to be paid by the Board to the owners of the selected station is the latter's cost of production.<sup>9</sup> The price to be paid by the owners of the selected station to the Board for electricity generated at that station is (in the absence of agreement) either (a) the cost of production<sup>9</sup> adjusted according to the load factor<sup>10</sup> and power factor<sup>11</sup> of the supply given by the Board to these owners *plus* a proportion of the Board's administrative and transmission costs, or (b) the tariff<sup>12</sup> fixed under the Act, whichever is the lower.<sup>13</sup> When operating under the control of the Board, a selected station will probably work at a higher load factor than was previously attainable, and the

<sup>1</sup> 1926, s. 5 (1).<sup>2</sup> *Ibid.*, Sched. I.<sup>3</sup> *Ibid.*, s. 5 (2) and (3).<sup>4</sup> *Ibid.*, s. 6 (1).<sup>5</sup> *Ibid.*, s. 6 (2).<sup>6</sup> *Ibid.*, s. 6 (3).<sup>7</sup> *Ibid.*, s. 7 (1).<sup>8</sup> *Ibid.*, s. 7 (1) and (2).<sup>9</sup> *Ibid.*, ss. 51 (3) and 7 (3).<sup>10</sup> *Ibid.*, Sched. II. It should be noted that the basis of calculation differs in the case of (a) a company undertaker, and (b) a local authority or joint electricity authority.<sup>11</sup> For definition, see para. 348, *infra*.<sup>12</sup> 1926, s. 11.<sup>13</sup> *Ibid.*, s. 7 (3) and (4).

operating costs will therefore fall. Accordingly, while the re-purchasing price will normally be higher than the cost of production under the new conditions, it may well be lower than the cost of production under conditions of individual development. If a selected station does not generate enough electricity for the owners' requirements, the deficiency is made up by the purchase of electricity from the "grid."<sup>1</sup> Disputes as to cost of production are determined by an auditor appointed by the Minister of Transport, and all other disputes between selected stations and the Board by the Electricity Commissioners.<sup>2</sup>

(iii) *The "Grid."*

**341.** Upon the adoption of a scheme, the Board are required to provide the grid of main transmission lines<sup>3</sup> either by construction of new lines or by the acquisition of existing lines.<sup>4</sup> The price payable for an existing line taken over by the Board is capital cost less depreciation;<sup>5</sup> and the Board must further defray the cost of altering or replacing switch-gear or other apparatus connected with the line.<sup>6</sup> Any questions in relation to such alteration or replacement are determined by an arbitrator appointed by the Minister of Transport.<sup>7</sup> The primary overhead transmission lines in the "grid" will be operated at 132,000 volts, and the secondary lines at 33,000 volts between phases, or other suitable voltage.<sup>8</sup>

(iv) *Standardisation of Frequency.*

**342.** Standardisation of frequency being in many areas a necessary preliminary to interconnection, the Board may require any authorised undertakers or owners of a selected station to alter their frequency so as to conform with a scheme, or with the views of the Board and of the Electricity Commissioners.<sup>9</sup> The cost of the transfer, including the cost of altering or replacing consumers' plant, falls on the Board, who may advance the necessary capital free of interest;<sup>10</sup> but the Board in their turn are entitled to recover the interest and sinking fund charges from the Electricity Commissioners, who treat the payments as part of their "expenses." These expenses are recoverable from joint electricity authorities and authorised undertakers,<sup>11</sup> but a special basis of allocation is prescribed for expenditure in respect of frequency standardisation, viz. "revenue" instead of "units sold."<sup>12</sup> In the long run, the cost of standardising frequency is thus spread over the whole of the electricity consumers in the country. Disputes under this section, including any

<sup>1</sup> See para. 343, *infra*.

<sup>2</sup> 1926, s. 7 (6).

<sup>3</sup> This expression includes transformers, switch gear, and necessary buildings in addition to the cables and overhead lines: 1919, s. 36.

<sup>4</sup> 1926, s. 8 (1) and (2).

<sup>5</sup> *Ibid.*, Sched. I.

<sup>6</sup> *Ibid.*, s. 8 (3).

<sup>7</sup> 1882, s. 28.

<sup>8</sup> Central Scotland Scheme, 1927 (Supplementary Particulars).

<sup>9</sup> 1926, s. 9 (1). Detailed provisions for alteration of frequency in the Glasgow and Clyde Valley areas will be found in the Central Scotland Scheme, 1927 (Supplementary Particulars).

<sup>10</sup> 1926, s. 9 (2).

<sup>11</sup> 1919, s. 29, and 1922, s. 7.

<sup>12</sup> 1926, s. 9 (3).



question as to the expense properly incurred in effecting a change of frequency, are referable to a barrister or advocate selected from the special panel.<sup>1</sup> The frequency of a supply to a railway company can only be altered under s. 16 of the Railways Act, 1921.<sup>2</sup> The frequency proposed by the Commissioners in their first scheme and likely to be adopted for the whole country is one of 50 cycles.

(v) *Supply by the Board under a Scheme.*

**343.** As soon as the Board have completed their preliminaries and have intimated that they are in a position to supply in any area, they come under an obligation to supply directly or indirectly to any authorised undertakers in the area all the energy they require at a price fixed for direct supplies under s. 11, and for indirect supplies under s. 12.<sup>3</sup> The Board cannot, however, except under certain circumstances, forcibly invade the area of a power company,<sup>4</sup> nor supply within any electricity district without the consent of the joint electricity authority, nor within the Edinburgh and Lothians district without the consent of Edinburgh Corporation.<sup>5</sup> In cases where the expense of giving any supply is disproportionate to the supply demanded, the Electricity Commissioners may authorise the imposition of special terms.<sup>6</sup> Owners of a "non-selected" station who ask a partial supply may be required to take their whole requirements directly or indirectly from the Board if the Board's price per unit, *plus* the cost per unit of providing plant required to enable the owners to take the Board's supply, will for a period of not less than seven years be less than the then cost per unit of local generation (exclusive of capital charges on their station).<sup>7</sup> In this calculation, the price of fuel and the rates of wages are to be assumed to remain constant.<sup>8</sup> Disputes on this topic are referred to the arbitration of a barrister or advocate selected from the panel.<sup>9</sup>

**344.** The Board's tariff for *direct supplies*, which may vary in different areas, must be so fixed that over a period to be approved by the Electricity Commissioners the revenue account shall balance or shew such margin as the Commissioners may allow.<sup>10</sup> The tariff must shew separately (a) a fixed kilowatt charges component, and (b) a running charges component ascertained on principles approved by the Commissioners; or it may be framed in the manner prescribed by an order of the Commissioners laid before both Houses of Parliament.<sup>11</sup>

In the case of *indirect supplies*, the intermediate supplier can only charge his bulk consumer the Board's price *plus* transmission charges ascertained in accordance with Schedule III.<sup>12</sup>

**345.** Owners of "selected stations" who can satisfy the Electricity Commissioners that they could themselves have generated at a cost less

<sup>1</sup> 1926, s. 9 (4).

<sup>4</sup> *Ibid.*, s. 10 (1) (a).

<sup>7</sup> *Ibid.*, s. 10 (3).

<sup>10</sup> *Ibid.*, s. 11 (1).

<sup>2</sup> 11 & 12 Geo. V. c. 55.

<sup>5</sup> *Ibid.*, s. 10 (1) (b) and (c).

<sup>8</sup> *Ibid.*, s. 51 (5).

<sup>11</sup> *Ibid.*, s. 11 (2).

<sup>3</sup> 1926, s. 10 (1).

<sup>6</sup> *Ibid.*, s. 10 (2).

<sup>9</sup> *Ibid.*, s. 10 (3) (b).

<sup>12</sup> *Ibid.*, s. 12.



than the Board's price, are entitled to a special tariff not greater than their own generating costs.<sup>1</sup> Such owners are thus formally guaranteed in perpetuity against possibility of prejudice; but if the forecast of the Weir Report is realised, this provision will be a dead letter. In any event, its application in practice will be attended by extreme difficulty. On the other hand, where the Board undertake for seven years to supply undertakers at a price less than the prevailing cost of local generation, the Electricity Commissioners may order any "non-selected" station to be shut down, thus forcing the undertakers to take the grid supply.<sup>2</sup> Thus non-selected stations will continue to operate unaffected by a scheme until—but only until—it is shewn to be to the advantage of the undertakers to take the Board's supply.

SUBSECTION (4).—*Subsidiary Powers and Financial Provisions.*

**346.** Authorised undertakers are empowered to carry out any arrangements into which the Board are authorised to enter with them, and, in the case of companies, to obtain powers from the Court of Session to raise additional capital.<sup>3</sup> The Board may acquire land compulsorily as a public authority within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919.<sup>4</sup> They may further acquire by agreement the right to use main transmission lines,<sup>5</sup> and may purchase surplus electricity produced by water-power, waste heat, or otherwise.<sup>6</sup>

**347.** The Board's receipts and expenses are paid into and defrayed out of a separate fund,<sup>7</sup> of which accounts must be kept and submitted to a prescribed audit.<sup>8</sup> Subject to the control of the Electricity Commissioners, the Minister of Transport, and the Treasury, the Board may borrow,<sup>9</sup> on the security of their undertaking and revenues and issue stock,<sup>10</sup> up to a limit of £33,500,000, and the Treasury may guarantee both principal and interest.<sup>11</sup> The limit for repayment is sixty years.<sup>9</sup>

SECTION 9.—UNITS, STANDARDS, AND TECHNICAL TERMS.

**348.** The "Board of Trade Unit" (B.T.U.) is defined in Special Orders and Acts to mean the energy contained in a current of 1000 amperes flowing under an electro-motive force of one volt during one hour, *i.e.* a kilowatt-hour. The ohm as the standard of resistance, the ampere as the standard of current, and the volt as the standard of pressure are defined by Order in Council of 10th January 1910. The expressions "plant factor," "load factor," and "power factor," which are of frequent occurrence in electricity acts and orders, require special note. A unit of plant of 1 kilowatt capacity operating continuously for a year would produce 8760 B.T.U.; but owing to fluctuations in demand the potential output is rarely, if ever, attained, and the ratio of actual

<sup>1</sup> 1926, s. 13.

<sup>2</sup> *Ibid.*, s. 14.

<sup>3</sup> *Ibid.*, s. 16.

<sup>4</sup> *Ibid.*, s. 21.

<sup>5</sup> *Ibid.*, s. 22.

<sup>6</sup> *Ibid.*, s. 23.

<sup>7</sup> *Ibid.*, s. 26.

<sup>8</sup> *Ibid.*, s. 30.

<sup>9</sup> *Ibid.*, s. 27.

<sup>10</sup> *Ibid.*, s. 28.

<sup>11</sup> *Ibid.*, s. 29.

to potential output is known as the "plant factor." The ratio of the average load to the maximum load over any given period of time is known as the "load factor," and is customarily stated as a percentage, the usual figure being between 20 per cent. and 40 per cent. In Direct Current systems the product of the voltage and amperage used gives the energy obtained, and this energy is measured in kilowatts (K.W.). In the more usual case of Alternating Current systems, the whole of the voltage and amperage applied do not necessarily act simultaneously, and the product gives only the apparent energy, which is measured in kilo-volt-amperes (K.V.A.). The true or effective energy is the product of those proportions of the voltage and amperage which act simultaneously, and is measured in kilowatts (K.W.). The power "factor" in such a system is the ratio of "true energy" to "apparent energy" (*i.e.*  $K.W. \div K.V.A.$ ), and is customarily stated as a decimal fraction of unity, a common figure for a mixed industrial load being .8. When the maximum values of current and voltage act simultaneously, they are said to be "in phase," and the "power factor" of the supply in such a case is unity. The Regulations made by the Electricity Commissioners as to safety and supply, extra high pressure,<sup>1</sup> and overhead lines are set out in Will's *Electric Lighting*.<sup>2</sup>

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<sup>1</sup> *I.e.* over 3000 volts.

<sup>2</sup> 5th ed., pp. 376 *et seq.*

EMBARGO.

EMBASSY.

*See* INTERNATIONAL LAW.

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EMBEZZLEMENT.

*See* CRIME.

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EMPLOYERS AND WORKMEN  
ACT, 1875.

*See* MASTER AND SERVANT.

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EMPLOYMENT OF CHILDREN.

*See* CHILDREN AND YOUNG PERSONS: FACTORY ACTS.

# ENGLISH LAW IN SCOTS PRACTICE.

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## SECTION 1.—INTRODUCTORY.

### SUBSECTION (1).—*The Scope of the Article.*

**349.** English case law, formerly viewed with mistrust,<sup>1</sup> is used in Scots practice to an increasing extent. The constant reference now made in the Courts of England and Scotland to each other's decisions

<sup>1</sup> *M'Cowan v. Wright*, 1852, 15 D. 232, per Lord Justice-Clerk Hope.



leads towards a gradual assimilation, as also does the growth of statute-law framed to operate in both countries. The Courts of either country are naturally influenced,<sup>1</sup> although not technically bound, by an authoritative decision from across the Border, and where unfortunately a difference has arisen it may be resolved by the House of Lords as the final appellate tribunal for both countries.<sup>2</sup> The tendency towards agreement may be seen even in those branches of the common law that are similar in both systems. But with all this great differences remain. In some departments of law there is indeed complete divergence.<sup>3</sup> In others it is necessary to keep in view particular points of difference. The main object of this article is to assist the Scots practitioner by affording some guidance as to points of identity, similarity, or difference on matters which are most frequently encountered in practice.

#### SUBSECTION (2).—*The Modern Branches of Law.*

**350.** Because of modern legislation, which overrides old differences and contemplates uniformity of rule, it is in modern branches of law that there is closest similarity. Thus the law relating to Patents, Designs, Copyright, Trade-marks, Carriage, Electricity Supply, etc., is nearly identical in both countries. Indeed English decisions upon such topics are treated as practically, although not theoretically, binding in a Scottish Court. "The law in maritime questions is British law: the law of Scotland is identical with that of England"<sup>4</sup> in questions relating to Shipping, Charter-parties, and Bills of Lading. Subject to some points of difference to be noticed later,<sup>5</sup> the same may be said of Bills of Exchange and Negotiable Instruments generally. On such topics the existing differences are so small as to present little difficulty in the application of decisions taken from the foreign jurisdiction.

#### SUBSECTION (3).—*The Older Branches of Law.*

**351.** In many of the older departments of law, on the other hand, there is radical divergence between the two systems. The whole system of Land-law and Conveyancing is different<sup>6</sup> in spite of isolated resemblances such as in the law relating to river boundaries,<sup>7</sup> the ownership of the solum of public highways,<sup>8</sup> or of water flowing above<sup>9</sup> or

<sup>1</sup> *Haldane v. Sinclair*, 1927 S.C. 562, per Lord Sands at p. 570.

<sup>2</sup> *Dennis v. A. J. White & Co.*, [1917] A.C. 479; *Blatchford v. Staddon and Founds*, [1927] A.C. 461, 471.

<sup>3</sup> See para. 351, *infra*.

<sup>4</sup> *Clydesdale Bank v. Walker & Bain*, 1926 S.C. 72, per Lord Justice-Clerk Alness at p. 82 (Maritime Lien).

<sup>5</sup> See para. 419, *infra*.

<sup>6</sup> *Lockhart v. Macdonald*, 1842, 1 Bell's App. 202, per Lord Cottenham at p. 213.

<sup>7</sup> *Bicket v. Morris*, 1866, 4 M. (H.L.) 44, per Lord Cranworth at p. 50.

<sup>8</sup> *Galbreath v. Armour*, 1845, 4 Bell's App. 374, per Lord Campbell at p. 381.

<sup>9</sup> *J. White & Sons v. J. & M. White*, 1905, 7 F. (H.L.) 41.

below <sup>1</sup> the surface, and the common-law right of support.<sup>2</sup> The statute *Quia Emptores*, 1290, abolished sub-infeudation, and thus departed from the feudal holding which is the essence of the Scots law of heritage. The law relating to estates in land is therefore radically different in Scotland and England.<sup>3</sup>

**352.** The Scots law of Marriage,<sup>4</sup> Parent and Child,<sup>5</sup> Succession,<sup>6</sup> Prescription,<sup>7</sup> and Procedure,<sup>8</sup> including the law of Arbitration,<sup>9</sup> is so dissimilar that a full comparison with English law in those spheres would only be of academic value, but some points of practical application will be noted in later sections. It is true that analogies must be found wherever decisions rest upon abstract reasoning and the meaning of words apart from any peculiar institution of law. Hence rules of construction cannot belong exclusively to one system. A similar spirit too pervades the common law in both countries. Its judicial development, therefore, tends towards similarity, and, in the law of evidence, for example, which is really the outcome of long judicial practice, the main principles are identical.<sup>10</sup>

**353.** Contract,<sup>11</sup> and Reparation or Tort,<sup>12</sup> call for particular attention. There is here a conspicuous general community, but it is broken by a number of sharp differences which often depend upon distinctions of underlying principle and may not be readily perceptible to the practitioner who has not a thorough knowledge of the other legal system. Such differences are more likely to lead to error than those which occur in statutes of common application to the two countries, and are more superficial.

## SECTION 2.—FAMILY LAW.

### SUBSECTION (1).—*Husband and Wife.*

**354.** The Matrimonial Causes Act, 1923,<sup>13</sup> has now made adultery alone on the husband's part enough to entitle the wife to divorce in

<sup>1</sup> *Scots Mines Co. v. Leadhills Mining Co.*, 1859, 31 Sc. Jur. 571, per Campbell L.C. at p. 576.

<sup>2</sup> *Howley Park Coal and Cannel Co. v. London and North-Western Rly. Co.*, [1913] A.C. 11, per Lord Shaw at p. 27.

<sup>3</sup> *Lord Advocate v. Hamilton*, 1919 S.C. (H.L.) 90, per Lord Haldane at p. 95

<sup>4</sup> See para. 354, *infra*.

<sup>5</sup> See para. 357, *infra*.

<sup>6</sup> See para. 361, *infra*.

<sup>7</sup> *Carstairs v. Spence*, 1924 S.C. 380; but see *Harvie v. Robertson*, 1903, 5 F. 338 for a common rule.

<sup>8</sup> *Cowan & Sons v. Duke of Buccleuch*, 1876, 4 R. (H.L.) 14, per Lord Penzance at p. 22; *D. & J. Nicol v. Dundee Harbour Trs.*, 1915 S.C. (H.L.) 7, per Lord Dunedin, and per Lord Salvesen at 1914 S.C. 389.

<sup>9</sup> The English Court has a discretionary power to supersede an arbitration clause, *Johannesburg v. D. Stewart & Co.*, 1909 S.C. (H.L.) 53; *In re Bjornstad*, [1924] 2 K.B. 673; cp. *Hegarty & Kelly v. Cosmopolitan Insurance Corporation*, 1913 S.C. 377, per Lord Pres. Dunedin at p. 386; but both systems admit the finality of award quoad the merits, *Kelantan Government v. Duff Development Co.*, [1923] A.C. 395.

<sup>10</sup> *H.M. Advocate v. Mitchell*, 1922, S.L.T. 443, per Lord Justice-Clerk Scott Dickson.

<sup>11</sup> See para. 369 *et seq.*, *infra*.

<sup>12</sup> See paras. 376 and 402, *infra*.

<sup>13</sup> 13 & 14 Geo. V. c. 19.

England. The Married Women's Property (Scotland) Act, 1920,<sup>1</sup> has assimilated the two laws as regards the disposal by a married woman of her separate estate. But the English law of husband and wife is so utterly different as only to concern the Scots practitioner in regard to the affairs of clients with English settlements or English domicile. It is, for instance, necessary to remember that marriage automatically revokes a will unless the will is expressed to be made in contemplation of marriage,<sup>2</sup> but in England there are no legal rights of *terce*, *jus relictæ*, or legitim to be excluded by ante-nuptial contract.

**355.** Under the Married Women's Property Acts, 1882,<sup>3</sup> and 1893,<sup>4</sup> and the Sex Disqualification Removal Act, 1919,<sup>5</sup> a married woman in England has very nearly, but not quite, the contractual power of a spinster. As regards capacity to own property of any kind she is under no disability, but, instead of simply conferring full contractual powers, the statutes have further developed the pre-existing equitable doctrine of a wife's "separate property." She now acquires anything as her statutory separate property. But when she contracts, she does not bind herself as a man or a spinster does; she binds her separate property. This nice distinction involves practical differences. For one thing, it is only a contract entered into by her "otherwise than as agent" that binds her separate property.<sup>6</sup> If, therefore, a married woman is in fact contracting as an agent, although the other party is unaware of the fact, she incurs no contractual liability whatever.<sup>7</sup> Moreover, any of her property that is subject to a "restraint upon anticipation" <sup>8</sup> is excepted from the statutes. This last is a device of English marriage-settlements, and has a slight resemblance to the Scots "alimentary interest," but is applicable only to married women during "coverture." The restraint flies off on the dissolution of the marriage. The Court has a discretionary power <sup>9</sup> to deal with a married woman's separate estate restrained from anticipation, either for her own benefit or for the benefit of creditors in her bankruptcy.<sup>10</sup> The English Court disregards the restrictions of a Scots alimentary provision,<sup>11</sup> and, on the other hand, a "restraint on anticipation" is not acknowledged as operative in Scotland.<sup>12</sup>

**356.** Following upon an English divorce no "legal rights" are acquired by the divorcing spouse, but the wife may obtain a decree for permanent alimony. Moreover, the English Court has a wide power of "varying" existing settlements in the interests of the innocent spouse and of the children of the marriage.

<sup>1</sup> 10 & 11 Geo. V. c. 64.

<sup>2</sup> Law of Property Act, 1925 (15 Geo. V. c. 20), s. 177; *Batty's Tr. v. Batty*, 1917 S.C. 385.

<sup>3</sup> 45 & 46 Vict. c. 75.

<sup>4</sup> 56 & 57 Vict. c. 63.

<sup>5</sup> 9 & 10 Geo. V. c. 71.

<sup>6</sup> Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1.

<sup>7</sup> *Paquin Ltd. v. Beauclerk*, [1906] A.C. 148.

<sup>8</sup> See Key and Elphinstone's Conveyancing Precedents, 11th ed., 1923, ii. 927.

<sup>9</sup> Conveyancing Act, 1911 (1 & 2 Geo. V. c. 37), s. 7.

<sup>10</sup> Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 52.

<sup>11</sup> *In re Fitzgerald*, [1903] 1 Ch. 933.

<sup>12</sup> *Mackie's Factor*, 1920, 2 S.L.T. 95.



SUBSECTION (2).—*Parent and Child.*

**357.** The Guardianship of Infants Acts of 1886<sup>1</sup> and 1925<sup>2</sup> have assimilated the law of guardianship, and the Legitimacy Act, 1926,<sup>3</sup> has introduced into England legitimation *per subsequens matrimonium*. But the law of capacity and minority is very different. There is in England no distinction between pupils and minors. Minority endures until the age of twenty-one with virtually the status of pupillarity. There is no right corresponding to legitim.

## SECTION 3.—TRUSTS AND SUCCESSION.

SUBSECTION (1).—*Trusts.*

**358.** English trust law has a special history<sup>4</sup> and the resemblance to the trust law of Scotland is only general. An English trustee is legal owner and on the failure of a trust may exclude the Crown as *ultimus hæres*.<sup>5</sup> Trust administration in England often seems lax according to Scots practice, no regular sederunt books being kept.<sup>6</sup> English trustees can only exercise their powers unanimously, not by a quorum.<sup>7</sup> The statutory powers have been enlarged<sup>8</sup> and they enjoy a valuable privilege of applying to the Court for guidance on almost any question of doubt or difficulty in an "administration suit."<sup>9</sup> On *delectus personæ*, as affecting the exercise of trust powers, the laws of England and Scotland run parallel.<sup>10</sup>

**359.** As regards apportionment between *fiar* and *liferenter* a difference of practice has arisen. When investments belonging to a trust are sold *cum* the prospective dividend the English rule, contrary to that of Scots decisions,<sup>11</sup> is that the proceeds are not apportioned but fall wholly into capital.<sup>12</sup> This divergence ought not to have arisen,<sup>13</sup> and, in the complementary case where investments are bought with trust money, the Courts of both countries have held that there is no allocation of the ensuing income.<sup>14</sup>

**360.** In England a person who takes an assignment from a trustee of the trustee's personal share in the trust property must suffer the

<sup>1</sup> 49 & 50 Vict. c. 27.<sup>2</sup> 15 & 16 Geo. V. c. 45.<sup>3</sup> 16 & 17 Geo. V. c. 60.<sup>4</sup> See Notes on English Law, etc., Burn-Murdoch (Green, 1924), p. 79 *et seq.*<sup>5</sup> *In re Jones*, [1925] 1 Ch. 340.<sup>6</sup> *Cp. Wilson v. Guthrie Smith*, 1894, 2 S.L.T. 338.<sup>7</sup> (Except in public or charitable trusts) *Luke v. South Kensington Hotel Co.*, 1879, 11 Ch. D. 121.<sup>8</sup> Law of Property Act, 1922 (12 & 13 Geo. V. c. 16), s. 109 *et seq.*<sup>9</sup> O.S.C., LV. r. 3.<sup>10</sup> *Shedden's Tr. v. Dykes*, 1914 S.C. 106, per Lord Pres. Strathclyde at p. 111.<sup>11</sup> *Donaldson v. Donaldson's Trs.*, 1851, 14 D. 165; *Cameron's Factor v. Cameron*, 1873, 1 R. 21; *M'Leod's Trs. v. M'Leod*, 1916 S.C. 604.<sup>12</sup> *Bulkeley v. Stephens*, [1896] 2 Ch. 241; *cp. Sir Robert Peel's Settled Estates*, [1910] 1 Ch. 389.<sup>13</sup> *Irving v. Houston*, 1803, 4 Pat. 521, per Lord Eldon at p. 529.<sup>14</sup> *In re Clarke*, 1881, 18 Ch.D. 190; *Gardiner Baird*, 1907, 15 S.L.T. 25; *Macdougall's Factor v. Watson*, 1909 S.C. 215.



consequences of subsequent breach of trust by his assignor, contrary to the Scots rule.<sup>1</sup>

### SUBSECTION (2).—*Intestate Succession.*

**361.** English law is here so different as to afford no guidance in questions of Scots law. A short statement<sup>2</sup> of the main rules of intestate succession may, however, be found convenient. They have lately been drastically changed and are now contained in the Administration of Estates Act, 1925.<sup>3</sup>

**362.** The old law of heritable succession still remains applicable for certain purposes. It is enough to say that its rules closely resemble the corresponding rules of Scots law subject to the following points:— (a) Descent or relationship is traced not necessarily from the intestate holder of land or heritable dignity but from the last “purchaser” in the conveyancer’s sense, viz. the last owner who took the land under a will or deed and not merely as heir on intestacy. (b) A father succeeds in preference to brothers or sisters. (c) As between two or more brothers the eldest is in every case preferred. (d) Relatives through a female ancestress may inherit in the absence of any agnate. (e) There is no collation and the heir can claim his share of intestate personal estate.

**363.** From 1st January 1926 all the old rules of succession to real or personal property have been abolished, subject to a saving clause of very limited application (ss. 45, 51). On the death of a person intestate as to any real or personal estate, the whole of such estate is now to be held by his personal representatives (executors, or administrators, *i.e.* executors-dative), as on trust to sell and convert into money (s. 33). Sale may be postponed, or ultimately dispensed with, but the effect is to mass the whole of the intestate’s land, money, and assets of all kinds, into one fund for purposes of succession. Henceforward there is no separate heir to land. Entirely new rules of succession are applied to the massed estate, irrespective of the character of its assets; these take the form of statutory trusts framed so as closely to resemble the kind of trusts most commonly favoured by modern wills and settlements.

**364.** After paying funeral expenses, debts, death-duties, and costs of administration, the personal representatives are to hold the whole residue of the estate on trusts, as follows (s. 46):—

1. The relict (widow or widower), if any, receives £1000 free of death-duties, and also the personal chattels, such as furniture, plate, stores, books, excluding any chattels acquired for business purposes.

2. If the intestate leaves no issue who live to take a vested interest (s. 47 (2)) the personal representatives hold the balance of the residue upon trust for the relict for life.

<sup>1</sup> *Edgar v. Plomley*, [1900] A.C. 431; *Macpherson’s Factor v. Mackay*, 1915 S.C. 1011.

<sup>2</sup> Taken from Notes on English Law, etc., Burn-Murdoch (Green, 1924), p. 113 *et seq.*

<sup>3</sup> 15 & 16 Geo. V. c. 23.

3. If the intestate leaves issue who live to take a vested interest, then, as to one-half of the residuary estate, it is held in trust for the relict for life; as to the other half, in trust for the issue on their appropriate "statutory trusts." These statutory trusts are detailed in a lengthy section (s. 47). They provide for division in equal shares among the surviving children who reach majority or marry. If a child has predeceased the intestate, that child's share goes to his or her issue who are alive at the death of the intestate and who reach majority or marry. If any child dies as a minor and unmarried, his share goes automatically to swell the shares of his brothers and sisters. There is power to make advancements out of a share that has not yet vested (s. 47 (1) ii).<sup>1</sup>

4. If the intestate leaves issue, but no widow or widower, the whole residuary estate goes to the issue, on these statutory trusts (s. 46 (1) ii).

5. If the intestate leaves no issue, the residue, subject to the rights already mentioned of the relict, if any, belongs absolutely to the intestate's father or mother, or equally to both if alive.

6. If the intestate leaves no issue or parent, then subject to the right of the relict, if any, the residue is held upon trust for the following persons in order (s. 46 (1) v):—

- (a) Brothers and sisters;
- (b) Half-brothers and half-sisters;
- (c) Grandparents, in equal shares;
- (d) Uncles and aunts;
- (e) Half-uncles and half-aunts;
- (f) The intestate's widow or widower absolutely.

**365.** In all these cases except (c) and (f) the personal representatives are to hold on the statutory trusts, which, as in the case of issue, imply postponement of vesting till majority or marriage, substitution of issue of a predeceasing member of the class, and automatic accretion of a lapsed share to the other members of the class. There is also power of advancement. Relationship for the purpose of intestate succession now ceases with the issue of uncles and aunts. More distant relatives, such as second cousins, are not included. Failing relatives within the list, the estate goes as *bona vacantia* to the Crown, which may provide for dependents or other persons for whom the intestate should have made provision (s. 46 (1) vi).

**366.** Neither under the old or the new law of England are there any "legal rights" similar to legitim, terce, or *jus relictæ*. A testator has power to dispose of his whole estate by will.

#### SUBSECTION (3).—*Wills.*

**367.** The English law of the execution and revocation of wills is entirely different from Scots law.<sup>2</sup> A will may be revoked by the mere

<sup>1</sup> See also Law of Property Act, 1922, s. 121.

<sup>2</sup> Wills Act, 1837 (1 Vict. c. 26).

fact of subsequent marriage.<sup>1</sup> Mutual wills are discussed and explained in a judgment by Mr Justice Astbury.<sup>2</sup> In questions of construction there is great similarity in the decisions of the two Courts: there is agreement as to bequests by implication,<sup>3</sup> the doctrine of "dependent relative revocation,"<sup>4</sup> and the revival of an absolute gift on the failure of a subsequent trust that qualified the gift.<sup>5</sup> The main principles of the law as to conversion are the same.<sup>6</sup> The doctrine of election is identical with that of Approbate and Reprobate.<sup>7</sup>

**368.** As to the exercise of powers of appointment, the Wills Act, 1837, assimilated the law of England to that of Scotland,<sup>8</sup> and Lord St. Leonards is recognised in the Scottish Courts as the weightiest authority,<sup>9</sup> but there is this point of divergence, that in England the exercise of the power may more easily be held to be operative in part although it is invalid in part.<sup>10</sup> The law of England differs as regards the validity or invalidity of conditions, such as conditions in restraint of marriage, attached to provisions in settlements,<sup>11</sup> and as to the rights created by the taking of securities in joint names; according to English law the survivor is entitled to the whole.<sup>12</sup> Interest on legacies does not begin to run until a year from death.<sup>13</sup>

#### SECTION 4.—CONTRACT AND CONSIDERATION.

##### SUBSECTION (1).—*Contract generally.*

**369.** The broad principles of offer and acceptance, and the interpretation and consequences of contract are common to both systems. There is agreement as to the award of damages under penalty clauses,<sup>14</sup> and in name of "quantum meruit."<sup>15</sup> The English law of evidence of the formation of contract, on the other hand, is utterly distinct. A "memorandum in writing" is required in the sale of goods<sup>16</sup> and in very many other contracts.<sup>17</sup> The most pervading difference between the two systems is caused by the English doctrine of consideration, to be discussed in the following sections, but in other respects also it

<sup>1</sup> See para. 354, *supra*.

<sup>2</sup> *Hadwen v. Myles*, [1925] 1 Ch. 75.

<sup>3</sup> *Law's Trs. v. Gray*, 1921 S.C. 454, per Lord Mackenzie at p. 460.

<sup>4</sup> *Gemmell's Exr. v. Stirling*, 1923, S.L.T. 384.

<sup>5</sup> *Donaldson's Trs. v. Donaldson*, 1916 S.C. (H.L.) 55, per Lord Parker at p. 64.

<sup>6</sup> *Buchanan v. Angus*, 1862, 4 Macq. 374, per Lord Westbury L.C. at p. 379.

<sup>7</sup> *Crum Ewing's Trs. v. Bayly's Trs.*, 1911 S.C. (H.L.) 18.

<sup>8</sup> *Penny's Trs. v. Penny's Trs.*, 1925 S.C. 175, per Lord Justice-Clerk Alness at p. 178.

<sup>9</sup> *Macleod's Trs. v. Macleod's Trs.*, 1914 S.C. 10, per Lord Kinnear at p. 14.

<sup>10</sup> *Collins's Trs. v. Collins*, 1913 S.C. 588, per Lord Dundas at p. 591; *Farwell on Powers*, ch. 6, ss. 6, 10, 17, 18, 24.

<sup>11</sup> *Sturrock v. Rankin's Trs.*, 1875, 2 R. 850; *Barker v. Watson's Trs.*, 1919 S.C. 109, per Lord Justice-Clerk Scott Dickson at p. 117.

<sup>12</sup> *Cunningham's Trs. v. Cunningham*, 1924 S.C. 581, per Lord Hunter at p. 589.

<sup>13</sup> *Waddell's Trs. v. Crawford*, 1926 S.C. 654, per Lord Murray at p. 657.

<sup>14</sup> *Dingwall v. Burnett*, 1912 S.C. 1097, per Lord Salvesen at p. 1107.

<sup>15</sup> *Boyd v. Forrest*, 1915 S.C. (H.L.) 20, per Lord Atkinson at p. 26.

<sup>16</sup> See para. 390 *et seq.*, *infra*.

<sup>17</sup> See textbooks on Contract, *voce* "Statute of Frauds."



must be recognised that the identity of principle is incomplete. In *Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co.*,<sup>1</sup> the House of Lords recognised and gave effect to an important divergence with regard to the rights of parties to a contract that has become impossible of performance. The English law has been stated by Lord Parmoor<sup>2</sup> to be that "When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded *ab initio*, but the parties are released from further performance. Thus, any payment previously made, and any legal right previously accrued according to the terms of the agreement will not be disturbed." The decision in *Cantiere San Rocco* was to the opposite effect, and it was observed that the well-known "Coronation cases" on impossibility of performance are inapplicable in Scotland.

**370.** English law contains no parallel to the law of Recompense or Compensation for the perfectly logical reason that no man becomes contractually bound without his knowledge or consent, and that without a contract there is no obligation.<sup>3</sup>

#### SUBSECTION (2).—*Consideration in Contract.*

**371.** The doctrine of consideration affects almost all English decisions on contractual questions, but it is treated so much as a necessary ingredient of contract that it may even be passed over silently. Although such decisions are often referred to in Scots practice, the doctrine, which seems to have been developed from the brocard *ex nudo pacto non oritur actio*,<sup>4</sup> is foreign to our law, and must be eliminated. In England, consent in offer and acceptance is not binding unless it is either contained in a writing under seal or given for a *quid pro quo*; one of these factors is necessary to the validity of every bargain. Historically these requisites were a matter of form, evidencing the mental assent of the consensor, but they became in time a part of the essence of contract.<sup>5</sup> Negotiable instruments were an exception to the rule under the law merchant. Consideration is "either some right, interest, profit, or benefit accruing to the one party (the obligee), or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other."<sup>6</sup> "It does not matter whether the party accepting the consideration has any apparent benefit thereby or not; it is enough that he accepts it, and that the party giving it does thereby

<sup>1</sup> 1923 S.C. (H.L.) 105.

<sup>2</sup> *French Marine v. Compagnie Napolitaine, etc.*, [1912] 2 A.C. 494 at p. 523.

<sup>3</sup> *Falcke v. Scottish Imperial Insurance Co.*, 1886, 34 Ch. D. 234; *Morgan v. Morgan's Factor*, 1922, S.L.T. 247.

<sup>4</sup> See Broom's Legal Maxims, *sub voce* "*Ex nudo pacto*."

<sup>5</sup> For a fuller statement see Notes on English Law, etc., Burn-Murdoch (Green, 1924), p. 19 *et seq.* Anson on Contract (16th ed., 1923, 59 *et seq.*); Pollock and Maitland, History of English Law (2nd ed., 1898, ii. 212); Broom's Legal Maxims, *voce* "*Ex nudo pacto*."

<sup>6</sup> *Currie v. Misa*, 1875, L.R. 10, Ex. 153.



undertake some burden, or lose something which in contemplation of law may be of value. An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.”<sup>1</sup> Stated shortly, the doctrine is that there must be two sides to every unsealed bargain, but it has been worked out to some results that are more logical than satisfactory.

SUBSECTION (3).—*No Promise Binding without Consideration.*

**372.** This is contrary to Scots law, by which one-sided obligations are valid if proved by writ or oath. The difference is far-reaching. From the English rule it follows that an offer, however expressed, can be withdrawn at any time before it is accepted.<sup>2</sup> But in Scotland, if the promise to keep the offer open is clear enough, it will be binding.<sup>3</sup> The rule that “both parties must be bound or neither” applies only to bilateral bargains, whose two sides are reciprocally conditional. On the other hand, some promises are held unilateral here in which English law would hold that there was valid consideration.<sup>4</sup>

SUBSECTION (4).—*Performance of Contract no Consideration for additional Promise.*

**373.** In England the performance of what is already a duty under an existing contract is no consideration for further benefits promised, and a promise by the other party to the contract in return for such performance is void for want of consideration.<sup>5</sup> This is logical at least, because what one is already bound to perform is not one's own to give. In Scots law such a promise would be valid even if it were deemed to be unilateral. It also follows, logically, from the English rule, that a contract to discharge a debt for the payment of a smaller sum is void for want of appreciable consideration. As it is no consideration to perform what one is already bound to do, it is less than nothing to perform only part.<sup>6</sup> If the English reasoning were held to be applicable to Scots law, it would follow that such a discharge would be a mere unilateral contract, and would require proof by writ or oath, even where the original debt was informally constituted. But this application of the doctrine is technical and has been scathingly spoken of.<sup>7</sup> It is sometimes stated in the form that consideration must be “appreciable,” although it need not be adequate. Any trifle such as “a canary, or a tom-tit,”<sup>7</sup> thrown into a bargain will be enough to satisfy the

<sup>1</sup> Pollock, *Principles of Contract*, 9th ed., 1921, p. 177, adopted by Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847.

<sup>2</sup> *Offord v. Davies*, 1862, 12 C.B. (N.S.) 748; *Dickenson v. Dodds*, 1876, 2 Ch. D. 463, 472.

<sup>3</sup> *Littlejohn v. Hadwen*, 1882, 20 S.L.R. 5.

<sup>4</sup> *Millar v. Tremamondo*, 1771, Mor. 12395; *Smith v. Oliver*, 1911 S.C. 103.

<sup>5</sup> Anson, *Contract*, 16th ed., p. 111; *Stilk v. Myrick*, 1809, 2 Camp. 317.

<sup>6</sup> *Foakes v. Beer*, 1884, 9 App. Cas. 605.

<sup>7</sup> *Couldery v. Bartrum*, 1881, 19 Ch. D. 394, per Sir G. Jessel M.R.

doctrine. In the case of the discharge of a debt, therefore, any stipulated variation in the mode of payment of the smaller sum, as, for example, payment at a different place or in a different currency, would constitute consideration and validate the discharge.

SUBSECTION (5).—*Consideration must be Present or Future, not Past.*

**374.** In certain circumstances only do past services amount to consideration, that is to say, when they were performed at the request of the subsequent promiser.<sup>1</sup> If the past services were gratuitously performed they are no consideration for a subsequent promise of reward. Gratitude is not consideration.<sup>2</sup> It is otherwise if the services were rendered on a mutual understanding that they should reap some reward unnamed. The past consideration then creates an illiquid but present claim, which is exchanged for the definite stipulation expressed in the later promise. There is some analogy here to the Scots distinction between unilateral and bilateral obligations; probably a promise following upon an illiquid claim would be held to constitute a true bilateral bargain, otherwise it would still be enforceable as unilateral, but limited as to mode of proof.

SUBSECTION (6).—*Consideration "must Move with the Promisee."*

**375.** In English legal theory the contract can only be enforced by a party whose act or forbearance constitutes consideration. Third parties, as "strangers to the consideration," cannot enforce the contract.<sup>3</sup> "An agreement between A. and B. that B. shall pay C. gives C. no right of action against B.,"<sup>4</sup> unless, indeed, the agreement placed property in trust, in which case the beneficiaries may enforce the trust.<sup>5</sup> This rule is foreign to Scots law whereby a *tertius* may gain a *jus quæsitum*, provided that he and his rights are made sufficiently definite. "The general rule of the law of Scotland is that every stipulation in a mutual agreement is binding upon the person obliged, whether it be conceived in favour of the other contractor or of a third party."<sup>6</sup> The English law doctrine is much broken in upon by the rules of equity. See *JUS QUÆSITUM TERTIO*. In any contract where no *jus tertio* is expressed, and none is implied by law, as between a relative of the contracting party and a landlord or doctor with whom the contract is made,<sup>7</sup> the rules of Scots and English law run parallel.

<sup>1</sup> *Lampleigh v. Brathwait*, 1615, Hobart 105; 1 Sm. L.C. 159; *Kennedy v. Brown*, 1863, 13 C.B. (N.S.) 677; *Stewart v. Casey*, [1892] 1 Ch. 104, per Bowen L.J. at p. 115.

<sup>2</sup> *Eastwood v. Kenyon*, 1840, 11 A. & E. 438; *Roscorla v. Thomas*, 1842, 3 Q.B. 234.

<sup>3</sup> *Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847, per Viscount Haldane L.C. at p. 853.

<sup>4</sup> *In re Rotherham Alum and Chemical Co.*, 1883, 25 Ch. D. 103, per Lindley L.J. at p. 111.

<sup>5</sup> *Gandy v. Gandy*, 1885, 30 Ch. D. 57, per Cotton L.J. at p. 67.

<sup>6</sup> *Macdonald v. Hall*, 1893, 20 R. (H.L.) 88, per Lord Watson at p. 95; *Lamont v. Burnett*, 1900, 3 F. 797. The divergence is expounded by Lord Dunedin in *Dickson v. National Bank of Scotland*, 1917 S.C. (H.L.) 50; *Carmichael v. Carmichael's Exrs.*, 1920 S.C. (H.L.) 195; by Lord Skerrington 1919 S.C. at p. 656.

<sup>7</sup> See para. 376, *infra*.

SUBSECTION (7).—*Actions for Reparation arising out of Contract.*

**376.** Some English cases in tort suggest analogies to *jus quæsitum tertio*, valid claims being enforced by persons who are not parties to the contract which has given rise to the action. This is because duties of avoiding fraudulent representations and certain kinds of negligence are independent of contract. So far as a duty arises outside contract, the doctrine of consideration has no place at all, and the nature of this separate ground of action must be clearly distinguished. Such a distinct duty may exist between parties who also stand to one another in a contractual relation,<sup>1</sup> as when a railway contracts with one person to carry another, and thereby comes under a duty towards the person carried. Fraudulent misrepresentations may give a right of action to the person who is deceived and injured, even if made in the course of a contract to which he was not a party.<sup>2</sup> Persons who possess or deal with dangerous things are liable in damages to anyone who suffers hurt thereby<sup>3</sup> if the things are dangerous by nature and in themselves.<sup>4</sup> A doctor may be liable *ex delicto* to his patient, although his services have been contracted for by someone else.<sup>5</sup> In the case of structures intended for human occupation<sup>6</sup> the duty of care, and the corresponding liability for negligence, depend upon control,<sup>7</sup> and the landlord has therefore no liability in delict towards the occupants. His contractual liability cannot extend beyond the tenant.<sup>8</sup> So far as rights of action are based in delict, the similarity of the two systems of law is unaffected by the specialities of consideration, but the border-line between delict and contract as the basis of action is sometimes difficult to draw.<sup>9</sup>

SUBSECTION (8).—*Special Meanings of Consideration—"Adequate" Consideration.*

**377.** Inadequate consideration is evidence of fraud, but the inadequacy must be gross.<sup>10</sup> The doctrine appears to be the same in both systems of law. Grossly inadequate consideration is a reason for the refusing of specific implement. Probably it must amount to an inference of fraud, "such as to shock the conscience."<sup>11</sup> "Good" or "meritorious" consideration in settlements and conveyances includes family affection towards spouse or child. Without consideration in this extended sense, conveyances made prior to bankruptcy are liable to be rescinded at the instance of third parties, although they may be

<sup>1</sup> *Heaven v. Pender*, 1883, 11 Q.B.D. 503, per Brett M.R.

<sup>2</sup> *Langridge v. Levy*, 1837, 2 M. & W. 519.

<sup>3</sup> *Parry v. Smith*, 1879, 4 C.P.D. 325.

<sup>4</sup> *Earl v. Lubbock*, [1905] 1 K.B. 253.

<sup>5</sup> *Edgar v. Lamont*, 1914 S.C. 277.

<sup>6</sup> *Indermaur v. Dames*, 1866, L.R. 1 C.P. 274.

<sup>7</sup> *Malone v. Laskey*, [1907] 2 K.B. 141.

<sup>8</sup> *Cameron v. Young*, 1908 S.C. (H.L.) 7.

<sup>9</sup> *Sachs v. Henderson*, [1902] 1 K.B. 612; *Allen v. M'Combie's Trs.*, 1909 S.C. 710, per Lord Pres. Dunedin at p. 716.

<sup>10</sup> Pollock on Contract, 9th ed., pp. 665, 666; *Tennent v. Tennent's Trs.*, 1870, 8 M. (H.L.) 10.

<sup>11</sup> Fry on Specific Performance, s. 444.



binding as between the original parties.<sup>1</sup> Good consideration, in this sense, also affects the equitable construction of a conveyance. If it is lacking, the Courts may infer an implied or resulting trust, whereby the whole beneficial ownership is diverted.<sup>2</sup> Consideration in Bills and Negotiable Instruments falls under a distinct branch of law, and may be found set forth there.<sup>3</sup>

## SECTION 5.—ERROR AND REDUCTION.

### SUBSECTION (1).—*Mistake and Misrepresentation in English Law.*

**378.** While these topics cover the same ground as the Scots law of essential error, there is in England no rule that error must be *in essentialibus* in order to vitiate contract. See ERROR. The only recognised principle appears to be (as also in the analogous case of fraudulent misrepresentation) that the mistaken belief must have amounted to a material inducement in the formation of the bargain. There is a further comprehensive distinction: while by Scots law a contract is either invalidated by error, or valid and completely enforceable, as by specific implement,<sup>4</sup> by English law there is a third alternative. There, a valid contract which is “legally” enforceable by way of damages may yet be unenforceable as far as regards the “equitable” remedy of specific performance.<sup>5</sup> Thus in the case of error, which, although the error of one party only, is known to and taken advantage of by the other party, the latter can obtain damages but not specific performance.<sup>6</sup> In Scotland, on the other hand, this particular form of error has been held to vitiate the contract absolutely.<sup>7</sup> Where a deed or other document has been signed under mistake, in order to set up a case for rescission beyond the ordinary rules as to misrepresentation English law requires that there must be mistake as to the entire nature of the document, not only as to incidental parts.<sup>8</sup> The Second Division has allowed an issue where there was no such error but only error as to the signer’s rights at the time of signing,<sup>9</sup> but a later decision<sup>10</sup> supports the English rule. The principle, applicable to contracts *uberrimæ fidei*,<sup>11</sup> that mere failure to disclose information is enough ground for avoidance, seems to be common to both systems.<sup>12</sup>

<sup>1</sup> Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59), s. 42; *In re Tankard*, [1899] 2 Q.B. 57.

<sup>2</sup> Smith, *Principles of Equity*, 5th ed., p. 77; *Hepworth v. Hepworth*, 1870, L.R. 11 Eq. 10.

<sup>3</sup> See para. 419, *infra*.

<sup>4</sup> *Stewart v. Kennedy*, 1890, 17 R. (H.L.) 1.

<sup>5</sup> See para. 399, *infra*.

<sup>6</sup> *Webster v. Cecil*, 1861, 30 Beav. 62; *Tamplin v. James*, 1879, 15 Ch. D. 215, per James L.J.

<sup>7</sup> *Stewart's Trs. v. Hart*, 1875, 3 R. 192.

<sup>8</sup> *Thoroughgood v. Cole*, 1581, 2 Co. Rep. 9; *Foster v. Mackinnon*, 1869, L.R. 4 C.P. 704; *Lewis v. Clay*, 1898, 67 L.J. Q.B. 224.

<sup>9</sup> *M'Caig v. Glasgow University Court*, 1904, 6 F. 918.

<sup>10</sup> *Selkirk v. Ferguson*, 1908 S.C. 26.

<sup>11</sup> Gloag on Contract, ch. 26.

<sup>12</sup> *Demerara Bauxite Co. v. Hubbard*, [1923] A.C. 673, at p. 682.



SUBSECTION (2).—“*Mutual*” Error.

**379.** Wherever there is such ambiguity in the terms of the contract that each party is equally justified in attaching to it a different meaning, the contract cannot be enforced, because the Court, whether English<sup>1</sup> or Scottish,<sup>2</sup> cannot say what the contract really is. Instances of this class are necessarily rare. Where, too, there is an erroneous pre-supposition, common to both parties, upon which the contract is founded, the two systems of law agree in holding the contract void. Where, for example, parties buy and sell a ship or cargo which they believe to be safely crossing the sea, although truly it has already been wrecked and lost, the error annuls the contract *ab initio*.<sup>3</sup> The same principle may be called into play in many different ways.<sup>4</sup>

SUBSECTION (3).—*Clerical Error.*

**380.** Mistakes in expressing the terms of a contract that are held to be merely clerical errors will be corrected or disregarded. The rule seems simple, but it is difficult to discover any test by which error can be adjudged to be merely clerical. Until *Krupp v. Menzies*,<sup>5</sup> the rule seemed to be either that both parties must repudiate the accuracy of the written contract, or else that the presence of the error must be discoverable from the internal evidence of the contract itself. But in that case an alleged error was remitted to proof, although there was a lucid written contract impugned only by one side. An English authority<sup>6</sup> there referred to has been doubted in England.<sup>7</sup> Reference to English authorities on this topic is fraught with danger, because they deal frequently with “rectification,” of which it is said that “Courts of equity do not rectify contracts; they may, and do, rectify instruments purporting to have been made in pursuance of the terms of contracts.”<sup>8</sup> That rectification is no part of Scots law was recognised by the House of Lords in *Inglis v. Buttery & Co.*<sup>9</sup>

SUBSECTION (4).—*Condictio indebiti.*

**381.** The law of payment in error is quite distinct in principle from essential error proper where the question is whether an obligation is vitiated by mistake. In *condictio indebiti* the hypothesis is that there never was an obligation to pay at all. The requisite to repetition is that there should have been a mistaken belief that payment was due.

<sup>1</sup> *Raffles v. Wichelhaus*, 1864, 2 H. & C. 906; *Falck v. Williams*, [1900] A.C. 176.

<sup>2</sup> *Buchanan v. Duke of Hamilton*, 1878, 4 R. (H.L.) 69.

<sup>3</sup> *Couturier v. Hastie*, 1856, 5 H.L.C. 673; *Gibson & Kerr v. Ship “Barcraig” Co., Ltd.*, 1896, 34 S.L.R. 114, 4 S.L.T. 129 per Lord Young.

<sup>4</sup> *Miller v. Anderson*, 1831, 9 S. 542; *Jones v. Clifford*, 1876, 3 Ch. D. 779; *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273.

<sup>5</sup> 1907 S.C. 903.

<sup>6</sup> *Harris v. Pepperell*, 1867, L.R. 5 Eq. 1.

<sup>7</sup> *May v. Platt*, [1900] 1 Ch. 616.

<sup>8</sup> *Mackenzie v. Coulson*, 1869, L.R. 8 Eq. 368, per Sir W. M. James V.-C. at p. 375.

<sup>9</sup> 1878, 5 R. (H.L.) 87, per Hatherley L.C. at p. 96.

Two old decisions of the House of Lords<sup>1</sup> were pronounced upon the basis that Scots and English law are at one on the subject of *condictio indebiti*. The rule then laid down that error of law is insufficient has been modified by the subsequent decision that private rights are matter of fact, although they may be the result of matter of law.<sup>2</sup>

## SECTION 6.—PARTNERSHIP.

### SUBSECTION (1).—*Joint Liability of Partners.*

**382.** The Partnership Act, 1890,<sup>3</sup> which applies to both countries, has consolidated and unified a great part of the law, at the same time causing the points of dissimilarity to stand out clearly. Sec. 9 preserves the difference as to the nature of a partner's liability; this in Scotland is joint and several, but in England joint only. Accordingly, the creditor of an English firm must discreetly choose which of the joint debtors he will sue, for by judgment against one or more he is precluded from any claim against the others under the doctrine of election.<sup>4</sup> His only safe course is to make all the partners defendants,<sup>5</sup> and he has no recourse against a dormant partner whom he may afterwards discover.

### SUBSECTION (2).—*Retired Partner.*

**383.** In England the liability of a retired partner rests only upon estoppel or personal bar, contrary to the Scots rule that a partner's liability for partnership debts simply endures, without alteration of its nature, until it is terminated in the appropriate way. Thus the liabilities at English law being of a different character, the ex-partner and the new firm cannot be joined as co-defendants; therefore, should the creditor choose unluckily, the doctrine of election deprives him of the alternative remedy.<sup>6</sup>

### SUBSECTION (3).—*Deceased Partner.*

**384.** In England the joint ownership of partners would lead to the result that the death of a partner should, "at law," end his rights as well as his liabilities in respect of partnership property. Equity, however, gave to his executors a share in the assets of the partnership and a corresponding liability with regard to all debts incurred before the decease.<sup>7</sup> This is now given a statutory basis.<sup>8</sup>

### SUBSECTION (4).—*English Partnership not a persona.*

**385.** Sec. 4 (2) preserves the Scots rule that a firm is a legal person distinct from the partners of whom it is composed. Consequently the

<sup>1</sup> *Wilson & M'Lellan v. Sinclair*, 1830, 4 W. & S. 398; *Dixons v. Monkland Canal Co.*, 1831, 5 W. & S. 445.

<sup>2</sup> *Cooper v. Phibbs*, 1867, L.R. 2 H.L. 149.

<sup>3</sup> 53 & 54 Vict. c. 39.

<sup>4</sup> *King v. Hoare*, 1844, 13 M. & W. 494; *M'Leod v. Power*, [1898] 2 Ch. 295.

<sup>5</sup> *Kendall v. Hamilton*, 1879, 4 App. Cas. 504.

<sup>6</sup> *Scarfv. Jardine*, 1882, 7 App. Cas. 345.

<sup>7</sup> *Devaynes v. Noble*, 1831, 2 Russ. & My. 495.

<sup>8</sup> Partnership Act, 1890, s. 9.

property belongs not to the partners but to the firm; the firm is the primary debtor in bankruptcy; a partner's estate can only be charged with the balance unpaid by the firm's estate; the firm may be debtor or creditor of a partner, and sue or be sued by him. Also, two firms with a common membership may sue each other; there may be sequestration of a firm without that of the partners; a partner's interest in a firm may be arrested by his creditor, or it may be arrested and assignation completed by intimation to the firm. In Scotland a partner may perhaps be employed as a workman of the firm.<sup>1</sup> The English partnership, on the other hand, is not a *persona*, but a mere aggregation of persons, and its incidents are of a character generally converse with those here enumerated. "In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience, under Order XLVIII. A, it may be used for the sake of suing and being sued."<sup>2</sup> "A firm is not a person in law, distinct from the partners who compose the firm. They are the joint owners of the partnership property."<sup>3</sup> A company is not bound, therefore, to enter the name of a firm upon its register.<sup>3</sup>

**386.** To a certain extent a partnership is, "in equity," treated as a *persona*, but "it is to be regretted that the Partnership Act has not gone further than it has in the direction of assimilating the English law to the Scotch."<sup>4</sup> In actual practice a partnership firm is legally recognised. It may sue or be sued in the firm name.<sup>5</sup> But the partnership as such cannot sue an individual partner or be sued by him.<sup>6</sup> The "property of the firm" is referred to<sup>7</sup> and an eminent judge can speak of the firm as "quite a different entity" from its membership.<sup>8</sup> Thus in practice the English theory of partnership is inconspicuous, but the difference of principle is always there. There is thus no rule, as in Scotland,<sup>9</sup> that a partner cannot be sued for a firm debt without calling the remainder of the firm.

#### SUBSECTION (5).—*Set-off between Individual and Firm Debts.*

**387.** From the absence of *persona* in the English legal conception of the firm there follows also a difference in the law of compensation or set-off. In Scotland, "a partner when sued for a company debt, as he is liable for it *in solido*,"<sup>10</sup> may set-off against the claim a debt owing

<sup>1</sup> *Sharpe v. Carswell*, 1910 S.C. 391, per Lord Guthrie; cp. *Ellis v. Joseph Ellis & Co.*, [1905] 1 K.B. 324. <sup>2</sup> *R. v. Holden*, [1912] 1 K.B. 483, per Hamilton J. at p. 487.

<sup>3</sup> *Vagliano Anthracite Collieries*, 1912, 79 L.J. Ch. 769, per Joyce J.

<sup>4</sup> *Lindley on Partnership*, p. 4.

<sup>5</sup> O.S.C., XLVIII. A, r. 1.

<sup>6</sup> *Meyer & Co. v. Faber*, (No. 2) [1923] 2 Ch. 421.

<sup>7</sup> *Lindley on Partnership*, 8th ed., 1912, e.g. p. 386.

<sup>8</sup> *In re Pennington & Owen, Ltd.*, [1925] 1 Ch. 825, per Pollock M.R. at p. 831.

<sup>9</sup> *Bell, Com.* ii. 508.

<sup>10</sup> And not jointly only as in England under the Partnership Act, 1890, s. 9; *Turner v. Turner*, [1911] 1 Ch. 716, per Cozens-Hardy M.R. at p. 719.



to him by the pursuer. And even the company itself, when it is sued for such a debt, may, with the concurrence of the partner who has a counter-claim against the pursuer, set-off that counter-claim against the debt sued for.”<sup>1</sup> But, in England, “In a proceeding against co-partners as such, a debt due from the plaintiff to one or more of the co-partners cannot be set-off against the claim of the plaintiff.”<sup>1</sup> In Scotland, “a partner, when sued for a debt owing by him individually to the pursuer, may, with the concurrence of the other partners, set-off against the claim of the pursuer a counter-claim of the company against the pursuer”;<sup>1</sup> but in England, “in a proceeding against one of the co-partners for a debt owing by him individually to the plaintiff, a debt due from the plaintiff to the partnership cannot be set-off against the claim of the plaintiff.”<sup>1</sup> In the same way one who owes a debt to a partner as an individual may in England be unable to set-off a debt due by the firm.<sup>2</sup>

#### SUBSECTION (6).—*Bankruptcy of Partnership.*

**388.** The law of Scotland relating to the bankruptcy of a firm or of its individual partners is preserved by the Partnership Act, 1890.<sup>3</sup> One difference thus perpetuated is that a creditor of the firm who in Scotland can rank upon a partner's estate, *pari passu* with the partner's individual creditors,<sup>4</sup> would in England be postponed to them.<sup>5</sup> Moreover, a Scottish firm, as a separate *persona*, may be sequestrated without sequestration of the individual partners, but in England a receiving order against the firm operates as if it were a receiving order made against each of the then partners.<sup>6</sup> Bankruptcy proceedings may be taken by or against partners in the firm name,<sup>7</sup> but an order of adjudication of bankruptcy may only be made against the partners individually.<sup>6</sup>

#### SUBSECTION (7).—*Joint Adventure.*

**389.** This phrase is used in both systems, but it is far from certain that it is used in the same sense. It has been stated that, in Scotland, “the distinction of a proper co-partnery and a joint adventure is simply this, that in the case of a proper co-partnery, the company is a separate *persona*.”<sup>8</sup> Unless the law has been changed by the enactment that receipt of a share in the profits of a business is *prima facie* evidence of partnership proper,<sup>9</sup> it seems that a Scotch joint adventure may be an impersonal confederacy like an English partnership. In England a

<sup>1</sup> Second Report, Mercantile Law Commission, 1855, p. 142.

<sup>2</sup> *In re Pennington & Owen, Ltd.*, [1925] Ch. 825.

<sup>3</sup> Sec. 47 (2).

<sup>4</sup> Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), s. 62; Goudy on Bankruptcy, pp. 349, 635.

<sup>5</sup> Bankruptcy Act, 1914 (4 & 5 Geo V. c. 59), s. 33 (6); Lindley on Partnership, 7th ed., p. 805; *Read v. Bailey*, 1877, 3 App. Cas. 94.

<sup>6</sup> Bankruptcy Rules, 1915, r. 285.

<sup>7</sup> Bankruptcy Act, 1914, s. 119.

<sup>8</sup> *Pyper v. Christie*, 1878, 6 R. 143, per Lord Justice-Clerk Moncreiff; *Cunningham v. MacLachlan & Stewart's Tr.*, 1891, 18 R. 460

<sup>9</sup> Partnership Act, 1890, s. 2.



joint adventure is described as "falling short of partnership,"<sup>1</sup> and it seems to mean a partnership terminable by either partner at will.<sup>2</sup>

### SECTION 7.—SALE.

#### SUBSECTION (1).—*Sale of Goods Act.*

**390.** The assimilation of the laws of Scotland and England by the Sale of Goods Act, 1893,<sup>3</sup> was not made complete.<sup>4</sup> The divergences that remain are due to the preservation of departments of common law, some of which extend beyond the limits of sale of goods. Thus the capacity to contract is left<sup>5</sup> to be governed by the pre-existing general law. From the difference in the law of capacity, particularly as regards minority and infancy, it follows that the definition of "necessaries" and the English case-law on the subject are not applicable to Scotland.

#### SUBSECTION (2).—*Memorandum in Writing.*

**391.** Under the Statute of Frauds, 1677, s. 4, a signed note or memorandum in writing is necessary as evidence of certain contracts, viz. (a) a special promise by an executor or administrator binding himself as an individual, (b) a promise to answer for another person's debt or default, i.e. a cautionary undertaking, (c) a collateral agreement in consideration of marriage, e.g. to settle money, (d) a contract or sale of lands or any "interest" therein, which includes the letting of shootings or furnished lodgings, (e) any agreement neither part of which is to be completed within a year. In case (d) only the statute may be elided by the performance of one side, the principle being similar to that of the Scots *rei interventus*. The Sale of Goods Act, 1893, s. 4, requires a similar note or memorandum in writing as evidence of a sale of goods in England, but it is dispensed with if the goods, or part of them, have been accepted, and actually received, by the buyer, or if earnest-money or part payment has been given. These provisions touch Scots practice chiefly in relation to the conflict of laws, because the evidential requirements do not go to the root of the contract, but only prohibit its enforcement. They are, therefore, matters of procedure only, and it is settled that they apply to a Scots contract, although perfectly valid by Scots law, if it is sought to enforce it in England.<sup>6</sup>

#### SUBSECTION (3).—*Sale of Future Goods—Spes.*

**392.** "There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may

<sup>1</sup> *Abrahams v. Herbert Reisch, Ltd.*, [1922] 1 K.B. 477, per Atkin L.J. at p. 482.

<sup>2</sup> *Warne v. Routledge*, 1874, L.R. 18 Eq. 497, per Jessel M.R. at p. 501.

<sup>3</sup> 56 & 57 Vict. c. 71.

<sup>4</sup> *Pollock & Co. v. Macrae*, 1922 S.C. (H.L.) 192, per Lord Dunedin at p. 201.

<sup>5</sup> Sale of Goods Act, 1893, s. 2.

<sup>6</sup> *Leroux v. Brown*, 1836, 12 C.B. 801; *Rochefoucauld v. Boustead*, [1896] 1 Ch. 196, at p. 207.

not happen.”<sup>1</sup> In English law this is an executory agreement to sell the goods when they come into existence. By Scots law a *spes* is itself susceptible of sale: it has been suggested<sup>2</sup> that such a transaction is, in Scotland, not an agreement of sale, but a sale *de presenti*, and that the Act does not apply. But “where, by a contract of sale, the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.”<sup>3</sup> The possibility of selling *de presenti* a *spes* apart from the Act does not seem sufficient to exclude the direct effect of these words, and it is thought that such a transaction amounts, in Scotland also, to an agreement to sell as defined by the Act.

#### SUBSECTION (4).—*Fixing Price.*

**393.** The price in a contract of sale may be left to be fixed in manner thereby agreed.<sup>4</sup> This leaves unaltered a sharp distinction between Scots and English law as to the method by which the price may be fixed. By Scots law<sup>5</sup> the price may competently be left to one or other of the parties to be fixed by him; a necessary complement of this rule is that the Court has authority to supervise this award of the party in his own cause with a view to correcting any grossly inequitable price. No corresponding rule is to be found in English law. A contract must be clear and definite to receive effect,<sup>6</sup> and the parties must make their own contract for themselves; the Court will not undertake the task of framing stipulations for them.<sup>7</sup> Pothier<sup>8</sup> and Roman law<sup>9</sup> support the English view.

#### SUBSECTION (5).—*Condition and Warranty.*

**394.** By English law, as codified in the Sale of Goods Act, the incidental stipulations of contracts are divided into the two classes of conditions and warranties. It is breach of a condition only that justifies repudiation of a contract.<sup>10</sup> Failure by the seller of goods to perform any material part of a contract of sale is in Scotland a breach of contract which entitles the buyer either to repudiate the contract, or else to retain the goods and seek damages.<sup>11</sup> A breach of warranty is failure in a material part.<sup>12</sup> The large body of law dealing with the distinction between conditions and warranties is therefore inapplicable in Scotland.

<sup>1</sup> Sale of Goods Act, 1893, s. 5 (2).

<sup>2</sup> Brown, *Sale of Goods*, at p. 31.

<sup>3</sup> Sale of Goods Act, 1893, s. 5 (3).

<sup>4</sup> *Ibid.*, s. 8 (1).

<sup>5</sup> *Stair*, i. 14, 1; *Ersk.* iii. 3, 4; *Earl of Montrose v. Scot*, 1639, Mor. 14, 155; *Lavaggi v. Pirie & Sons*, 1872, 10 M. 312; *Bell's Prin.*, s. 92.

<sup>6</sup> *Guthing v. Lynn*, 1831, 2 B. & Ad. 232.

<sup>7</sup> *Davies v. Davies*, 1887, 36 Ch. D. 359, 396.

<sup>8</sup> *Contr. de Vente*, p. 23.

<sup>9</sup> *Dig.* xviii. 35, 1.

<sup>10</sup> *Couston, Thomson & Co. v. Chapman*, 1872, 10 M. (H.L.) 74, per Lord Chelmsford at p. 81.

<sup>11</sup> Sale of Goods Act, 1893, s. 11 (2).

<sup>12</sup> *Ibid.*, s. 62 (1).

SUBSECTION (6).—*Actio quanti minoris*—*Sale of Heritage*.

**395.** Notwithstanding his wider powers of repudiation, the purchaser of goods in Scotland is given <sup>1</sup> the same universal remedy as in England of retaining the faulty goods and claiming damages *quanti minoris*. On the other hand, the sale of heritage is regulated by the older Scots law, by which the remedy is confined to cases where restitution is no longer possible, and the purchaser has lost the remedy of repudiation, because the *res* is not *integra*.<sup>2</sup> Accordingly the purchaser of Scotch heritage who is disappointed in the subjects sold to him has, in the ordinary case, only two alternatives. He must either take them as they stand, however inferior to his expectations, or he must resile and repudiate the whole transaction. In the latter case alone he may obtain damages, but the remedy is confined within narrow limits; the discrepancy between the expectation and the actual lands sold must amount to essential error, and in *Woods v. Tulloch* <sup>3</sup> a very serious discrepancy was held insufficient. The buyer of English land, on the other hand, may retain the subjects and at the same time claim damages.<sup>4</sup>

SUBSECTION (7).—*Market Overt*.

**396.** This is preserved as a part of English law by s. 22, which does not apply to Scotland. This doctrine applies to sales of goods in the City of London on week-days or in country towns on market days. If the sale is open and public, a valid title to the goods is conferred upon the buyer, even although they may have been stolen.<sup>5</sup> Only as a matter of private international law is market overt recognised in Scotland.<sup>6</sup>

SUBSECTION (8).—*Interest on Price*.

**397.** Whereas in Scotland interest is due from the date when the price actually becomes payable and is wrongfully withheld,<sup>7</sup> or when the goods are tendered to the buyer, in England it is only due where a fixed sum is payable by virtue of a written instrument at a fixed date.<sup>8</sup> This difference is left outstanding by the Sale of Goods Act, 1893.<sup>9</sup>

SUBSECTION (9).—*Specific Performance*.

**398.** This may in England be ordered by the Court in the case of a sale of specific or ascertained goods. The right of specific implement in Scotland is expressly safeguarded. That is a universal right, unlike

<sup>1</sup> Sale of Goods Act, 1893, s. 11 (2).

<sup>2</sup> *Louttit's Trs. v. Highland Rly. Co.*, 1892, 19 R. 791, per Lord M'Laren at p. 800.

<sup>3</sup> 1893, 20 R. 477.

<sup>4</sup> *May v. Platt*, [1900] 1 Ch. 616.

<sup>5</sup> *Hargreave v. Spink*, [1892] 1 Q.B. 25.

<sup>6</sup> *Todd v. Armour*, 1882, 9 R. 901.

<sup>7</sup> *Blair's Trs. v. Payne*, 1884, 12 R. 104.

<sup>8</sup> *London, Chatham, and Dover Rly. v. South-Eastern Rly.*, [1893] A.C. 429.

<sup>9</sup> Secs. 49 and 54.



the remedy in English law.<sup>1</sup> Wherever performance is capable of enforcement, the contracting party is as fully entitled to have it carried out under compulsion as he is to the equivalent damages, should he so choose. In England, on the contrary, the remedy was unknown to the common law<sup>2</sup> and was the creature of equity.<sup>3</sup> It was not to be obtained as a matter of course, and in many cases still it cannot be invoked by an aggrieved plaintiff who has a valid claim for damages. "The defendant may be answerable in damages at law without being liable to a specific performance in this (Chancery) Court. In cases of specific performance the Court exercises a discretion, and, knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not in all cases decree a specific performance."<sup>4</sup>

**399.** The English Court does not enforce specific performance of contracts that are "voluntary," *i.e.* gratuitous or unilateral, notwithstanding that they are under seal and operative by way of damages for non-performance.<sup>5</sup> Nor will it order performance of a contract "which the Court cannot perform,"<sup>6</sup> as where performance involves continuous acts and would require the watching and supervision of the Court.<sup>7</sup> And it declines jurisdiction in respect of many building contracts that would be specifically enforced in Scotland.<sup>8</sup> It will not enforce positive covenants in a lease, on the part either of the landlord or the tenant, but will leave them to be measured by damages.<sup>9</sup> English decisions on specific performance afford no safe guidance in Scots law.<sup>10</sup>

#### SECTION 8.—PRINCIPAL AND AGENT.

**400.** There is a general community of principle in this department of law which is sometimes noticed judicially,<sup>11</sup> but much more implied in the free resort to English decisions by bar and bench. Any difference in rules seems to be accidental rather than fundamental. The First Division and the Court of Appeal have, however, recently pronounced opposite decisions<sup>12</sup> upon the ostensible authority of a hirer to create a lien for repairs over the article hired.

<sup>1</sup> *Wm. Beardmore & Co., Ltd. v. Park's Exrx.*, 1928, S.L.T. 143, per Lord Justice-Clerk Alness and Lord Hunter.

<sup>2</sup> Fry on Specific Performance, 6th ed., 1921, s. 62.

<sup>3</sup> *Ibid.*, s. 50 *seq.*

<sup>4</sup> *Malins v. Freeman*, 1837, 2 Keen 25; see also *Alvanley v. Kinnaird*, 1849, 2 Macq. & G. 1; *Baxendale v. Seale*, 1854, 19 Beav. 601; *Van Praagh v. Everidge*, [1902] 2 Ch. 266; and para. 030, *supra*.

<sup>5</sup> Halsbury, xxvii. 7.

<sup>6</sup> Fry on Specific Performance, s. 91.

<sup>7</sup> Halsbury, xxvii. 8.

<sup>8</sup> Fry on Specific Performance, s. 102.

<sup>9</sup> *Lumley v. Wagner*, 1854, 1 De G. M. & G. 604, per Lord St. Leonards L.C. at p. 617.

<sup>10</sup> *Stewart v. Kennedy*, 1890, 17 R. (H.L.) 1, per Lord Herschell at p. 5, and Lord Watson at p. 9.

<sup>11</sup> *Aberdeen Rly. Co. v. Blaikie Bros.*, 1854, 1 Macq. 461, per Lord Brougham at p. 477 (Duty of Agent to Principal).

<sup>12</sup> *Lamont v. Arthur G. Foulds, Ltd.*, 1928, S.L.T. 42; *Albemarle Supply Co. v. Hind & Co.*, [1928] 1 K.B. 307.



**401.** There is a difference as to *negotiorum gestio*. This is borrowed directly from the Digest, and there is not much Scots authority. It is a spontaneous agency, without authority or ratification, to carry on some existing business neglected by the quasi-principal. The *gestor* is entitled to no remuneration beyond outlays.<sup>1</sup> *Negotiorum gestio* is unknown in English law. Although the expression is sometimes used there in the sense of implied agency, authority is always implied from the fact that the principal has himself placed the agent in the position from which the authority is inferred. In *negotiorum gestio* proper, the *gestor* may apparently assume the authority spontaneously. It is true that in both countries unauthorised actings may be adopted by a principal so as to constitute true agency by ratification, but this is a different thing. The doctrine of *quantum meruit*<sup>2</sup> does not apply: that gives a claim for remuneration only for services performed under an actual contract in which the rate of payment has been left unfixed.<sup>3</sup>

## SECTION 9—TORT AND REPARATION.

### SUBSECTION (1).—General Comparison.

**402.** The principles of the English law of tort correspond closely with those of delict or reparation in Scotland, and English decisions are very freely referred to for their illustration of rules of common application. Thus the whole law of negligence in general, as interpreted in England, is applicable and useful. This community of principle has been judicially recognised in numerous topics of reparation, as, liability towards trespassers,<sup>4</sup> or licensees,<sup>5</sup> nuisance,<sup>6</sup> damage caused by animals,<sup>7</sup> or by dangerous things generally under the rule in *Rylands v. Fletcher*,<sup>8</sup> injury of highways by unfair use,<sup>9</sup> malicious prosecution,<sup>10</sup> the scope of a servant's authority to affix liability on his master,<sup>11</sup> the doctrine of common employment,<sup>12</sup> and the rule that interest does not run upon damages for reparation.<sup>13</sup>

**403.** There are points of difference in the law relating to collisions.<sup>14</sup> It must be borne in mind too that in any question in Scotland as to

<sup>1</sup> Ersk. Inst. iii. 3, 52; but cp. *Dunbar v. Wilson and Dunlop's Tr.*, 1887, 15 R. 210.

<sup>2</sup> Pleading in *Dunbar v. Wilson and Dunlop's Tr.*, *cit.*

<sup>3</sup> Blackstone, Com. iii. 150; *Sumpter v. Hedges*, [1898] 1 Q.B. 673.

<sup>4</sup> *Latham v. R. Johnson & Nephew*, [1913] 1 K.B. 398, per Hamilton L.J. at pp. 411, 412.

<sup>5</sup> *Tough v. North British Rly. Co.*, 1914 S.C. 291.

<sup>6</sup> *Giblin v. Middle Ward of Lanarkshire District Council*, 1927, S.L.T. 562.

<sup>7</sup> *Fraser v. Pate*, 1923 S.C. 748.

<sup>8</sup> 1868, L.R. 3 H.L. 330; *Caledonian Rly. Co. v. Greenock Corporation*, 1917 S.C. (H.L.) 56, per Lord Shaw at p. 65.

<sup>9</sup> *Glasgow Corporation v. Barclay Curle & Co.*, 1923 S.C. (H.L.) 78, per Viscount Finlay at p. 82.

<sup>10</sup> *Mills v. Kelvin & Jas. White, Ltd.*, 1913 S.C. 521, per Lord Pres. Clyde at p. 527.

<sup>11</sup> *Percy v. Glasgow Corporation*, 1922 S.C. (H.L.) 144, per Lord Dunedin.

<sup>12</sup> *Bartonshill Coal Co. v. Reid*, 1858, 3 Macq. 266; *Mercer v. Ness*, 1922, S.L.T. 548.

<sup>13</sup> "*Vitruvia*" S.S. Co. v. *Ropner Shipping Co.*, 1923 S.C. 574, per Lord Sands at p. 589.

<sup>14</sup> These are noted in Roberts on The Law of Collisions on Land.

whether circumstances amount, upon first principles, to a legal wrong, the law of England cannot afford a sure guide. Its foundations were laid in the peculiar forms of action of its early days, and it contains many seeming anomalies which, for their explanation, require reference to its historical growth.<sup>1</sup> In England an employer has an *actio per quod servitium amisit* for damages caused to him by injury to his servant,<sup>2</sup> but in Scotland it has been held there is no actionable wrong done to the injured person's employer apart from malice in the defender.<sup>3</sup>

#### SUBSECTION (2).—*Solatium*.

**404.** Solatium is used to express all reparation that is not comprehended under the head of actual patrimonial loss.<sup>4</sup> Scots law recognises that there are wrongs without a money standard, and, as a comprehensive rule, that a person suffering an injury of this description is no less entitled to ordinary redress. On the other hand, English law does not recognise solatium or admit this general principle, and money damage is the only recognised *damnum* except in particular instances. In certain instances, however, there is a right of action for what is virtually solatium. Some actions, too, are admittedly based entirely upon damage other than patrimonial loss, that is to say, simply solatium as known to Scots law. Thus the action for breach of promise of marriage is "not a complaint of anything affecting property, whether personal or real; it is an injury, that is, it is a cause of action purely personal on both sides."<sup>5</sup>

**405.** It results from the non-recognition of solatium in England that defamation is not actionable when expressed only to the person defamed, because without publication to third parties any patrimonial loss is out of the question. But "our law differs from that of England, for our law says that a man may have damages for injury done to his feelings."<sup>6</sup> The contrast is marked, extending to slander of a man "contained in a letter addressed to himself which would not have obtained publicity unless he himself gave it publicity."<sup>7</sup>

**406.** In certain circumstances solatium, though not so described, is awarded by English law when an action can be technically supported by some trifle of patrimonial loss. Such is the claim for damages for seduction of a daughter in an action raised by a parent or person *in loco parentis*.<sup>8</sup> The old form of action "trespass on the case," is employed, based upon the ground "*per quod servitium amisit*."<sup>9</sup> The theoretical ground of action being the lost services

<sup>1</sup> *Admiralty Commrs. v. S.S. "Amerika."* [1917] A.C. 38, esp. judgment of Lord Parker.

<sup>2</sup> *Bradford Corporation v. Webster*, [1920] 2 K.B. 135.

<sup>3</sup> *Reavis v. Clan Line Steamers*, 1925 S.C. 725.

<sup>4</sup> *Black v. North British Ry. Co.*, 1908 S.C. 444, at p. 453.

<sup>5</sup> *Finlay v. Chirney*, 1888, 20 Q.B.D. 494, 498.

<sup>6</sup> *Mackay v. M'Cankie*, 1883, 10 R. 537, per Lord Pres. Inglis.

<sup>7</sup> *Ramsay v. M'Lay & Co.*, 1890, 18 R. 130.

<sup>8</sup> *Irwin v. Dearman*, 1809, 11 East 23.

<sup>9</sup> See para. 403, *supra*.

of the daughter, it is necessary to prove the loss of some trifling service of utilitarian character.<sup>1</sup> "For that fiction there must be foundation, however slender, in fact,"<sup>2</sup> but whenever the action is technically competent, the damages are out of all relation to the patrimonial loss on which it is based.<sup>3</sup> It may be noticed here that English law, differing from Scots law, applies the maxim *volenti non fit injuria* to seduction, so that the person primarily injured can never have a right of action.

### SUBSECTION (3).—*Damages.*

**407.** "Nominal damages" are often sued for in England in circumstances that in Scotland would be met by an action of declarator of right, possibly in conjunction with interdict. The declaratory form of action is not available for general purposes by English law,<sup>4</sup> and questions of property and ownership are therefore often disposed of by the subterfuge of a claim of nominal damages for trespass or the like. "It is likewise immaterial in strictness of law whether there be any actual damage or not."<sup>5</sup> "Every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right."<sup>6</sup> In all cases of nominal damages the award of costs is in the discretion of the Court.<sup>7</sup> In actions which have a legitimate ulterior purpose, costs are awarded in accordance with the result on the merits. Farthing damages are also awarded by juries in quite different circumstances to signify disapproval of actions, but the plaintiff in such a case will not, as a rule, get costs.

**408.** Penal or "exemplary" damages may be awarded in England in actions for tort, not for breach of contract.<sup>8</sup> The amount may be enhanced by the circumstances of the wrong; in short, the law permits the penal element to be included in the award.<sup>9</sup> Although the authorities are not decisive, it is also stated that gross negligence has the same effect, subjecting the wrong-doer to a heavier liability than he would have incurred had the same injury been caused by slighter fault. This doctrine was unsuccessfully maintained in *Black v. The North British Rly.*, where Lord Dunedin said: "I find no authority for any distinction between damages and exemplary damages in the law of Scotland. There is, however, a good deal of authority in the law of England."<sup>10</sup>

<sup>1</sup> *Whitbourne v. Williams*, [1901] 2 K.B. 722, 724.

<sup>2</sup> *Hedges v. Tagg*, 1872, L.R. 7 Ex. 283.

<sup>3</sup> *Bedford v. M'Kowl*, 1800, 3 Esp. 119.

<sup>4</sup> *Countess de Gasquet James v. Duke of Mecklenburg Schwerin*, [1914] P. 53.

<sup>5</sup> Pollock on Tort, 12th ed., p. 350.

<sup>6</sup> *Ashby v. White*, 1703, 2 L. Raym. 938.

<sup>7</sup> *Garnett v. Bradley*, 1878, 3 App. Cas. 944; O.S.C., LXV. r. 1.

<sup>8</sup> *Addis v. Gramophone Co.*, [1909] A.C. 488.

<sup>9</sup> Beven on Negligence, pp. 42-43; *Livingstone v. Rawyards Coal Co.*, 1880, 5 App. Cas.

25, per Lord Blackburn at p. 39.

<sup>10</sup> 1908 S.C. 444, at p. 453.



SUBSECTION (4).—*Libel and Slander.*

**409.** English law distinguishes sharply between libel—*i.e.* defamation written, engraved, or represented in some permanent form—and slander, the mere verbal utterance of defamation. The principle is common to libel in England and all defamation in Scotland that representations which produce appreciable injury to the reputation of another are defamatory.<sup>1</sup> This is often expressed as the causing of “hatred, ridicule, or contempt.”<sup>2</sup> The law of both countries is the same as to innuendo and inference.<sup>3</sup> On the other hand, mere slander is in England actionable only (1) upon proof of “special damage,” *i.e.* some definite loss of appreciable money value, caused by the slander complained of; or (2) in the case of words “actionable *per se*,” *i.e.* imputations of a criminal offence, of a contagious disease, of a man’s unfitness with regard to his particular trade or vocation, or (in the case of a woman) unchastity.<sup>4</sup> It is said that in such cases special damage is presumed, because injury to reputation is manifest without evidence.<sup>5</sup> But whenever the slander is such as to render an action of damages competent, the damages which may legally be awarded are such as correspond with those which in Scotland are awarded in name of solatium. Actions for slander in Scotland being thus less restricted by technical rules, the relevancy of averments is scrutinised more closely.<sup>6</sup> It has already been noted<sup>7</sup> that in England no action lies whether for libel or slander without publication to third parties. The only remaining distinction in the law of defamation is that in England libel<sup>8</sup> is also in itself a crime, whereas in Scotland defamation is not so in itself but only incidentally if couched in blasphemous or indecent form.

## SECTION 10.—“ACTIO PERSONALIS MORITUR CUM PERSONA.”

SUBSECTION (1).—*Active Transmission.*

**410.** This maxim is cited and followed both in English and Scots law, but the former follows no precise principle.<sup>9</sup> As regards rights of action in favour of a deceased man, the English rule in all actions founded on tort, not contract, is that the right of action ceases with the death of the person entitled to sue. His representatives can no longer enforce it. The exceptions are injuries to goods or chattels personal;<sup>10</sup> injuries to real property within six months of decease,<sup>11</sup> and the recovery from a wrong-doer of specific acquisitions or their

<sup>1</sup> Odgers on Libel and Slander, p. 1.

<sup>2</sup> Pollock on Tort, 12th ed., p. 237; *Paterson v. Welch*, 1893, 20 R. 744.

<sup>3</sup> *Russell v. Stubbs Ltd.*, 1913 S.C. (H.L.) 14, per Lord Shaw at p. 24.

<sup>4</sup> Slander of Women Act, 1891 (54 & 55 Vict. c. 51), s. 1.

<sup>5</sup> Pollock on Tort, 12th ed., p. 238.

<sup>6</sup> *Rooney v. M’Nairney*, 1909 S.C. 90.

<sup>7</sup> Para. 405, *supra*.

<sup>8</sup> As distinct from Slander.

<sup>9</sup> For a critical examination see *Admiralty Commrs. v. S.S. “Amerika,”* [1917] A.C. 38, esp. Lord Sumner; *Leigh’s Exrs. v. Caledonian Rly. Co.*, 1913 S.C. 838.

<sup>10</sup> 4 Edw. III. c. 7; 25 Edw. III. st. 5, c. 5.

<sup>11</sup> 3 & 4 Will. IV. c. 42.

value.<sup>1</sup> The Scots rule as to active transmission is that an action for reparation, if the claim be not intimated before death,<sup>2</sup> is not competent to representatives except in so far as it is founded upon patrimonial loss, *i.e.* pecuniary damage to the deceased's estate.<sup>3</sup> It is thus simpler and more complete; but the same idea is latent in the English decisions, and has been made the express test in the case of breach of promise actions. These have been held to be "personal" in the sense of the brocard, although theoretically arising from contract.<sup>4</sup> The right of action does not therefore transmit unless special damage is averred, *i.e.* "actual loss to the temporal estate of the promisee arising out of the breach of contract."<sup>5</sup> Special damage is the same as patrimonial loss.<sup>6</sup>

#### SUBSECTION (2).—*Passive Transmission.*

**411.** In England the death of the wrong-doer is also a bar to proceedings. The exceptions are the same as two already mentioned,<sup>7</sup> *i.e.* injuries to real property, where the action is brought against the representatives within six months of their entering office, and action for the recovery of specific acquisitions. The Scots rule is again simpler: the right of action transmits in every case against representatives *quanti lucrati*, *i.e.* so far as they stand possessed of any assets of the wrong-doer's estate.<sup>8</sup> Even a claim for mere solatium will thus transmit, apart from any pecuniary loss.<sup>9</sup>

#### SUBSECTION (3).—*Occurrence of Death barring independent Right of Action.*

**412.** The brocard has been extended in England outside its natural meaning in a way that is unknown in Scots law. Where a death has been wrongfully caused, there can be no right of action even by a person who has thereby suffered independent damage.<sup>10</sup> This development is illogical,<sup>11</sup> and has been partly overcome by Lord Campbell's Act, 1846,<sup>12</sup> which allows a parent, spouse, or child of the deceased to sue for damages. The action must be founded upon appreciable pecuniary loss to the claimants,<sup>13</sup> but no basis of damages is provided. In Scotland solatium as well as patrimonial loss may by common law be recovered by the spouse, parent, or child of a victim to negligence;

<sup>1</sup> *Hambly v. Trott*, 1776, 1 Cowp. 371; Pollock on Tort, 12th ed., p. 70.

<sup>2</sup> *Leigh's Exrx. v. Caledonian Rly. Co.*, 1913 S.C. 838.

<sup>3</sup> *Bern's Exr. v. Montrose Asylum*, 1893, 20 R. 859; *General Billposting Co. v. Youde*, 1910, 47 S.L.R. 788; 2 S.L.T. 84.

<sup>4</sup> *Chamberlain v. Williamson*, 1814, 2 M. & S. 408.

<sup>5</sup> *Finlay v. Chirney*, 1888, 20 Q.B.D. 494, at p. 507.

<sup>6</sup> *Davidson v. Tulloch*, 1860, 3 Macq. 783, at p. 795; *Bern's Exr.*, *supra*, at p. 864.

<sup>7</sup> Para. 410, *supra*.

<sup>8</sup> *Davidson v. Tulloch*, 1860, 3 Macq. 783.

<sup>9</sup> *Evans v. Stool*, 1885, 12 R. 1295.

<sup>10</sup> *Osborn v. Gillett*, 1873, L.R., 8 Ex. 88.

<sup>11</sup> Pollock on Tort, 12th ed., p. 62.

<sup>12</sup> 9 & 10 Vict. c. 93

<sup>13</sup> *Duckworth v. Johnson*, 1859, 4 H. & N. 653.

the law on this point, however, is as arbitrary <sup>1</sup> as the English statutory provision; other near relatives of a deceased person can recover nothing for solatium in respect of the death, however much they may have suffered.<sup>2</sup>

## SECTION 11.—SECURITY RIGHTS.

### SUBSECTION (1).—*Mortgage of Property.*

#### (i) *Real Security by Mortgage of Land or Buildings.*

**413.** The law of mortgages has been much altered by the Law of Property Act, 1925,<sup>3</sup> but it is highly technical and, in conception and terminology, entirely alien to Scots law. There is no land registration except in London and Yorkshire, and, even there, registration is not invariable. Moreover, the statutory changes have not swept away the "equitable mortgage" which may be effected without any formal deed or document by handing over possession of a document of title. As against the borrower, however, the remedies of the lender in England, especially foreclosure, sale, and the appointment of a receiver at his own hand, are more readily effectual than the remedies of a Scottish bondholder.

#### (ii) *Mortgage of Incorporeal Personal Property.*

**414.** Personalty of an incorporeal kind, such as stock or shares of a company, can, subject to an appropriate conveyance, be conveyed in England in security by way of mortgage much in the same way as land. In Scotland the mere deposit of such documents as share certificates or letters of guarantee confers no security,<sup>4</sup> but in England an equitable charge, equivalent to a mortgage, may be created merely by depositing the documents of title. A deposit of share certificates is in practice usually accompanied by a transfer deed, signed by the borrower, the date and transferee's name being left blank.<sup>5</sup>

#### (iii) *Security over Corporeal Moveables.*

**415.** While in Scotland there is no real right created unless the transfer of corporeal moveables is completed by delivery, and a security over moveables *retenta possessione* is of no effect,<sup>6</sup> the English Bill of Sale Acts of 1878 and 1882<sup>7</sup> enable a valid security to be created,

<sup>1</sup> Per Lord Watson in *Clarke v. Carfin Coal Co.*, 1891, 18 R. (H.L.) 63; *Darling v. Gray & Sons*, 1892, 19 R. (H.L.) 31.

<sup>2</sup> Glegg on Reparation, p. 81; *Eisten v. North British Rly. Co.*, 1870, 8 M. 980; *Greenhorn v. Miller*, 1855, 17 D. 860.

<sup>3</sup> 15 Geo. V. c. 20, Pt. iii.

<sup>4</sup> *Robertson v. British Linen Bank*, 1891, 18 R. 1225; Gloag and Irvine on Rights in Security, p. 520.

<sup>5</sup> *Ex parte Sargent*, 1874, L.R. 17 Ex. 273; *France v. Clark*, 1883, 22 Ch. D. 830. See BLANK TRANSFER, Vol. II. p. 271, *ante*.

<sup>6</sup> Gloag and Irvine on Rights in Security, pp. 188, 189.

<sup>7</sup> 41 & 42 Vict. c. 31; 43 Vict. c. 43.



without change of possession, by the granting of a Bill of Sale. This may be an out-and-out assignment but, when granted conditionally, is virtually a mortgage. To be valid it must be registered within seven days of the making, and it must be re-registered every five years. A five-year search of the Register of Bills of Sale may therefore be required to ascertain whether moveables in a person's possession have been disposed of by him in this way.

(iv) *Floating Charges.*

**416.** These are a vague quasi-security, unknown to the law of Scotland, which has grown up in England and is recognised by statute in connection with companies. A floating charge is usually granted in connection with a debenture issue, itself a vague thing.<sup>1</sup> It may be expressed to charge all the assets of the company for the time being, including uncalled capital,<sup>2</sup> but it does not afford any real security and does not affect specifically any assets until some event occurs that crystallises the charge into a fixed or true security.<sup>3</sup> "A floating charge is ambulatory and shifting in its nature, hovering over and, so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp."<sup>4</sup> The charge begins to fasten on the specific assets held by the company when it ceases to carry on business, or at the commencement of a winding-up, or upon the appointment of a receiver for the debenture-holders and intimation of the appointment to third persons concerned.<sup>5</sup> A mere demand for payment does not have this effect.<sup>6</sup> Until the floating charge has settled thus upon assets the company is free to dispose of them or to mortgage them specifically, and it cannot be restrained from doing so<sup>7</sup> unless the debentures contain an undertaking by the company not to create subsequent charges.<sup>8</sup> Floating charges created within three months of the winding-up of a company are expressly invalidated by the Companies Consolidation Act.<sup>9</sup>

SUBSECTION (2).—*Caution, and Suretyship or Guaranty.*

**417.** Guaranty is the same as caution: it is one of the contracts of which the Statute of Frauds, 1677, s. 4 requires proof in the form of

<sup>1</sup> "No one seems to know exactly what 'debenture' means"; Buckley on Companies, 10th ed., 1924, p. 232.

<sup>2</sup> *Ballachulish Slate Quarries v. Menzies*, 1908, 45 S.L.R. 667, per Lord Pres. Dunedin.

<sup>3</sup> *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979.

<sup>4</sup> Per Lord Macnaghten in *Illingworth v. Houldsworth*, [1904] A.C. 355; see Romer L.J., [1903] 2 Ch. 295.

<sup>5</sup> Lindley on Companies, 6th ed., 1902, p. 325; Buckley on Companies, 10th ed., 1924, p. 243.

<sup>6</sup> *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979.

<sup>7</sup> *Cox Moore v. Peruvian Corporation, Ltd.*, [1908] 1 Ch. 604.

<sup>8</sup> *English and Scottish Mercantile Investment Co. v. Brunton*, [1892] 2 Q.B. 700, per Bowen L.J. at p. 712; *In re Valletort Sanitary Steam Laundry Co.*, [1903] 2 Ch. 654.

<sup>9</sup> Companies (Consolidation) Act, 1908 (8 Ed. VII. c. 69), s. 212.

a signed memorandum. The consideration need not be expressed therein,<sup>1</sup> but the doctrine of consideration<sup>2</sup> governs the validity of the contract. The mere existence of a debt in respect of which the guaranty is given is therefore not consideration for the guarantor's promise. It need not take the form of benefit to him, and it usually consists in some forbearance on the creditor's part, such as forbearing to sue for payment. If the debt is incurred after the promise of guaranty and in reliance upon it there is plainly consideration in the sense of the doctrine. The guarantor's discharge may be proved by parole evidence.<sup>3</sup> Contracts of guaranty are not subject to prescription,<sup>4</sup> but they cease<sup>5</sup> to be enforceable by action, which for most purposes comes to the same thing, in twenty years in the case of deeds (under seal), and otherwise in six years.

**418.** Apart from an express contract of guaranty, reliance may be placed upon statements or representations as to character or credit. Under similarly worded statutes<sup>6</sup> an action on such a representation is excluded unless the representation is in writing and signed. The English statute requires that the memorandum be signed by the defender personally.<sup>7</sup> Moreover, the English statute is expressed that "no action shall be brought" on the unwritten promise which, by the Scottish statute, "shall have no effect" and cannot therefore be pleaded in defence.<sup>8</sup>

#### SECTION 12.—BILLS OF EXCHANGE AND CHEQUES.

**419.** The laws of Scotland and England as to negotiable instruments have been closely assimilated by the Bills of Exchange Act, 1882.<sup>9</sup> There are three remaining differences to be noticed. (First) Scots law, which concedes validity to a gratuitous promise,<sup>10</sup> is left unaltered by the Act.<sup>11</sup> But in England, under the general law of consideration in contract,<sup>2</sup> a bill may be unenforceable because of absence of consideration,<sup>12</sup> unless at the instance of a holder in due course. In both countries every party whose signature appears on a Bill is *prima facie* deemed, under statute,<sup>13</sup> to have become a party to the bill for value.

**420.** (Secondly) There is no "summary diligence" in England, but the holder can obtain decree in a summary way. In, *inter alia*, an

<sup>1</sup> Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 3.

<sup>2</sup> See para. 371 *et seq.*, *supra*.

<sup>3</sup> Cp. the limitation by Scots law to writ or oath.

<sup>4</sup> Cp. the Scots Act, 1695, c. 5, Septennial Prescription.

<sup>5</sup> Under the Statutes of Limitation.

<sup>6</sup> Lord Tenterden's Act, 1828 (9 Geo. IV. c. 14), s. 6; Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60), s. 6.

<sup>7</sup> By the Scots statute the signature of an authorised agent suffices.

<sup>8</sup> *Union Bank of Scotland v. Taylor*, 1925 S.C. 835.

<sup>9</sup> 45 & 46 Vict. c. 61.

<sup>10</sup> Bell's Prin., ss. 8 and 63.

<sup>11</sup> Sec. 27; *Law v. Humphrey*, 1875, 3 R. 1192; illegality, or failure, of consideration are separate topics.

<sup>12</sup> Byles on Bills, *voce* s. 27.

<sup>13</sup> Sec. 30 (1).

action on a bill, the writ may be "specially endorsed."<sup>1</sup> If the defendant does not appear, the plaintiff files an affidavit of service<sup>2</sup> and can then and there sign final judgment. Even if appearance is entered the plaintiff may file an affidavit of belief that there is no defence.<sup>3</sup> The judge may then empower him to enter final judgment, and will do so unless the defendant satisfies him, by affidavit or otherwise, that there are grounds of defence. If this occurs, the situation is similar in effect to the position in Scotland when a note of suspension is passed. Unless this happens the holder of the bill obtains a summary judgment on which execution will issue, comparable to summary diligence.<sup>4</sup>

**421.** (Thirdly) A bill does not in England operate as assignment of a fund. "In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee"; whereas, in England, "A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for payment thereof, and the drawee of a bill who does not accept . . . is not liable on the instrument."<sup>5</sup> An English banker cannot therefore honour a countermanded cheque, and he is usually unconcerned with the subsequent questions between the drawer and holder. The only liability of the banker, if he dishonours a cheque, is to his customer.<sup>6</sup> The banker incurs no liability to the holder unless he has assented to the order to pay and has communicated this to the holder.<sup>7</sup> From the fact that a cheque does not of itself operate as an assignment in England, it follows that unless it is paid, or at least accepted for payment, it cannot form a valid *donatio mortis causa*<sup>8</sup> or a completed gift *inter vivos*.<sup>9</sup>

### SECTION 13.—COMPANIES.

#### SUBSECTION (1).—*Administration and Practice.*

**422.** The Companies (Consolidation) Act, 1908,<sup>10</sup> provides broadly the same law for both countries, except as regards liquidation. There are only incidental differences otherwise. Company petitions are regulated by detailed Orders of Court<sup>11</sup> to which there are no corresponding Acts of Sederunt. The English Courts, in dealing with reduction

<sup>1</sup> O.S.C., III. r. 6.

<sup>2</sup> *Ibid.*, XIII. r. 2.

<sup>3</sup> *Ibid.*, XIV. r. 1.

<sup>4</sup> See Byles on Bills, 18th ed., 1923, pp. 329 *et seq.*

<sup>5</sup> Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 49 (12).

<sup>6</sup> *Schroeder v. Central Bank*, 1876, 34 L.T. 735; Hart, Banking, 3rd ed., 1914, p. 453; cp. for Scots law, *British Linen Bank v. Carruthers*, 1883, 10 R. 923; *Waterston v. City of Glasgow Bank*, 1874, 1 R. 470.

<sup>7</sup> *Warwick v. Rogers*, 1843, 5 Manning and Granger 340, per Tindall C.J. at p. 374.

"Marking" of the cheque is not enough, Paget, Banking, 3rd ed., 1922, p. 191.

<sup>8</sup> *In re Beaumont*, [1902] 1 Ch. 889; cp. *Milne v. Grant's Exrs.*, 1884, 11 R. 887.

<sup>9</sup> *In re Swinburne*, [1926] 1 Ch. 38.

<sup>10</sup> 8 Edw. VII. c. 69.

<sup>11</sup> *E.g.* General Order as to Reduction of Capital, 1909.



of capital under s. 46, have shewn less willingness to dispense with the use of the words "and reduced," but have gone further in granting powers to sell the undertaking.<sup>1</sup> The power of an English company to grant a peculiar quasi-security, described as a "floating charge" has already been noticed.<sup>2</sup> The registration of nearly<sup>3</sup> all mortgages and charges granted by an English company is vital.<sup>4</sup> If not registered with the Registrar of Companies within twenty-one days of execution, they are void as against the liquidator and creditors of the company. This applies even to heritable bonds over Scottish heritage granted by an English company. The ordinary Scottish land registration is not enough but may make it necessary to apply to the English Court<sup>5</sup> for extension of time on cause shewn. An extension of time is provided in the case of mortgages of property outside the United Kingdom.<sup>6</sup>

#### SUBSECTION (2).—*Liquidation.*

**423.** The Act provides separate and distinct systems for Scotland and England. Moreover, the English Court have exercised the statutory powers by issuing the Companies (Winding-up) Rules, 1909, which almost equal the Act in bulk and comprise also fifty-six forms for use in liquidation. The outstanding difference is the prominence of the Board of Trade and the Official Receiver. The Board of Trade is invested with extensive powers of supervision. The liquidator must answer any inquiry made by it, and he may be judicially interrogated on its application.<sup>7</sup> If a winding-up is not concluded within a year he must send in a periodical return shewing the state of the liquidation.<sup>8</sup> Where a provisional liquidator is appointed after the presentation of a petition the Court usually<sup>9</sup> appoints the Official Receiver. On the making of a winding-up order the Official Receiver becomes provisional liquidator *ex officio*, unless and until some other appointment is made.<sup>10</sup> He is usually appointed liquidator and is then styled "Official Receiver and Liquidator." There is no "official liquidator" as in Scotland. If another person is appointed he is styled "Liquidator" simply.<sup>11</sup>

**424.** The Committee of Inspection<sup>12</sup> is an English institution.<sup>13</sup> The liquidator must regard its directions.<sup>14</sup> Its specific functions are nowhere tabulated, but its sanction is made<sup>15</sup> an alternative to the Court's sanction for the purpose of (a) bringing or defending legal proceedings; (b) carrying on the business of the company; (c) employing any agent for matters which the liquidator cannot transact; in England the

<sup>1</sup> See *John Walker & Sons, Ltd.*, 1914 S.C. 280.

<sup>2</sup> See para. 416, *supra*.

<sup>3</sup> For exceptions see Palmer, *Company Precedents*, 12th ed., 1920, pp. 185-6.

<sup>4</sup> 1908 Act, s. 73.

<sup>5</sup> *Ibid.*, s. 96.

<sup>6</sup> *Ibid.*, s. 93 (1) (i).

<sup>7</sup> *Ibid.*, s. 159 (1), (2); Winding-up Rules, 1909, R. 207.

<sup>8</sup> Rules 189, 190, Form 92.

<sup>9</sup> But not necessarily, 1908 Act, s. 149 (3) (a).

<sup>10</sup> 1908 Act, s. 149 (3) (b).

<sup>11</sup> *Ibid.*, s. 149 (9).

<sup>12</sup> *Ibid.*, s. 160.

<sup>13</sup> An appointment has been made in Scotland, but it has no statutory locus or powers; *Webb*, 1922 S.C. 226.

<sup>14</sup> 1908 Act, s. 158 (1).

<sup>15</sup> *Ibid.*, s. 151 (1).

appointment of a solicitor is sanctioned only for specified business and not by way of general assistance; <sup>1</sup> (d) paying any class of creditors in full; (e) making any compromise or agreement with creditors; (f) compromising any debt or question affecting the assets; <sup>2</sup> (g) making calls.<sup>3</sup> To these must be added the following powers and duties: (h) to fix the liquidator's remuneration; <sup>4</sup> (i) to obtain authority for the liquidator to bank otherwise than with the Bank of England; <sup>5</sup> (j) to request the Board to invest any spare cash balance; <sup>6</sup> or (k) to sell any such investment; <sup>7</sup> (l) to require the liquidator to submit to them all the books and vouchers at least every three months and to satisfy themselves that these are properly kept; <sup>8</sup> (m) to audit the cash book at least quarterly; <sup>5</sup> (n) where the business is carried on the liquidator must keep a distinct trading account; this must be audited monthly.<sup>9</sup>

425. The separate Bankruptcy law of England <sup>10</sup> and Scotland <sup>11</sup> is respectively applied to liquidations.<sup>12</sup> Winding-up in England has not,<sup>13</sup> as in Scotland,<sup>14</sup> the retrospective effect of cutting down diligence done within the preceding sixty days.

<sup>1</sup> 1908 Act, s. 151 (1) (d).

<sup>2</sup> *Ibid.*, s. 214 (1).

<sup>3</sup> *Ibid.*, s. 173; R. 83 (1).

<sup>4</sup> R. 154.

<sup>5</sup> 1908 Act, s. 154 (1); R. 165.

<sup>6</sup> *Ibid.*, s. 231 (1); R. 168.

<sup>7</sup> *Ibid.*, s. 231 (2); R. 168 (2).

<sup>8</sup> R. 167 (2).

<sup>9</sup> R. 171.

<sup>10</sup> Bankruptcy Act, 1914 (4 & 5 Geo. V. c. 59).

<sup>11</sup> Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20).

<sup>12</sup> 1908 Act, ss. 207 and 208.

<sup>13</sup> *Ibid.*, s. 211.

<sup>14</sup> *Ibid.*, s. 213.

## ENGRAVING.

*See* COPYRIGHT.

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## ENGROSSER.

*See* FAIRS AND MARKETS.

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## ENLISTMENT.

*See* ARMED FORCES OF THE CROWN.

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## ENMITY.

*See* WITNESS.





## PART I.—THE HISTORY OF ENTAILS.

## SECTION 1.—INTRODUCTION.

**426.** The word entail implies a “cutting off,” and in its widest sense signifies any deed by which the ordinary course of succession sanctioned by law is cut off, and an arbitrary destination substituted for it. “An estate which descends according to the succession appointed by law cannot be made subject to the fetters of an entail; in other words, a conveyance on which such a destination follows is nothing more than a conveyance to a single individual.”<sup>1</sup> Thus the first thing essential to constitute a strict deed of entail is, that the destination in the deed of conveyance should be to a prescribed series of heirs who are not the heirs-at-law of the entailer. Next, it is necessary that the deed should contain certain clauses, called the fetters of the entail, which operate so as to keep the estate intact throughout the whole line of succession prescribed by the entailer, and by which the heirs are chained, as it were, to the land, and the land to the heirs.

## SECTION 2.—THE ACT OF 1685.

**427.** The doubt whether it was possible at common law to grant such a conveyance, so as effectually to bind the heir in questions with third parties, led to the passing of the Statute of 1685, c. 22, which enacted that it should thenceforth be lawful to tailzie lands, and laid down the conditions under which this might effectually be accomplished. The author of this statute was Sir George Mackenzie, then Lord Advocate, and more familiarly known as “Bloody” Mackenzie. No deed of conveyance can constitute a strict deed of entail which does not conform with the terms of this statute, either actually or constructively, in terms of the later Entail Acts. The statute declared that the deed of conveyance must contain the following clauses: (1) such prohibitory clauses as the entailer should think fit; (2) irritant clauses; and (3) resolute clauses. The prohibitory clauses had to include three essential prohibitions, called the cardinal prohibitions, namely, clauses prohibiting the alienation of the estate from the heirs specified in the deed of conveyance, the contraction of debt affecting the estate, and the alteration of the order of succession. The effect of the irritant and resolute clauses was merely to make the prohibitory clauses operative, the resolute clause containing the penalty which an heir of entail would incur should he contravene any of the prohibitions—namely the forfeiture of his right to the estate—and the

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Entails; Bell's Prin., ss. 1716–1774 c; R. Bell, Lectures on Conveyancing, ii. 1012–1073; Ross, Lectures, ii. 503; Bell, Com. i. 43; vi. 178, 241; Stair, ii. 3, 43; More, Notes, lxxx., clxxvi., exc., ccvi.; Bankt. ii. 3, 133; Ersk. iii. 8, 22; Kames, Equity; Duff, Feudal Conv., p. 334; Menzies, Conv., pp. 719–769.

<sup>1</sup> *Moubray's Trs. v. Moubray*, 1895, 22 R. 801, per Lord Rutherford Clark at p. 808.

irritant clauses declaring that all deeds granted in contravention of the prohibitions should be null and void. A deed of conveyance containing these clauses, and a destination to a prescribed series of heirs, would become a strict deed of entail, binding on all parties by the proper execution of certain formalities set forth in the Statute of 1685, the most important of which was the publication of the deed of entail by registration in the Register of Tailzies. A deed of conveyance containing a clause authorising the registration of the deed in the Register of Tailzies is now, in terms of the later Entail Acts, construed as containing the whole cardinal prohibitions, properly fenced by irritant and resolute clauses.<sup>1</sup>

428. It was always competent at common law to grant a deed of entail which would be binding in questions *inter hæredes*, so as to prevent the heir in possession from gratuitously disposing or alienating the estate, or from altering the order of succession, but which did not bind him in onerous transactions with third parties. After the passing of the Statute of 1685, there was a series of decisions as to the effect of deeds of entail in which one or more of the cardinal prohibitions were either omitted or were not properly fenced with irritant and resolute clauses. The gist of these decisions was to the effect that although an heir in possession might not be validly prevented, through some defect in the deed of entail, from entering into onerous transactions with third parties which would affect the estate, and might even alienate it altogether from the subsequent heirs of entail, yet at the same time he might be debarred from gratuitously affecting the estate, or altering the order of succession.<sup>2</sup> Such questions are now only of historical interest, for it is provided by the Rutherfurd Act<sup>3</sup> that, where any entail is ineffectual as to one of the cardinal prohibitions, either through a defect in the original deed of entail, or in the investiture following thereon, then the entail shall be deemed to be invalid and ineffectual as regards all the prohibitions, and the entail becomes null and void without any action of declarator. The heir in possession of an entailed estate is not a liferenter, but a limited fiar of the estate, and his power of dealing with the estate is absolute except in so far as he is fettered by the conditions of the deed of entail; he does not represent his predecessor, not being the entailer, universally, and he takes the estate as a singular successor.<sup>4</sup>

429. It was found, however, that under a strict deed of entail, constituted in terms of the Act of 1685, an heir's powers were so limited as not only to give rise to serious hardships in the case of the heir himself and his family, but also injuriously to affect the beneficial management of the estate. This led to the passing of a series of Entail

<sup>1</sup> See para. 458, *infra*.

<sup>2</sup> See *Buchanan v. Carrick*, 1844, 3 Bell's App. 342; *Stewart v. Fullerton*, 1827, 5 S. 418; 4 W. & S. 196.

<sup>3</sup> 11 & 12 Vict. c. 36, s. 43.

<sup>4</sup> *Earl of Galloway v. Duke of Bedford*, 1902, 4 F. 851, per Lord Kinnear at p. 867.



Statutes which gradually extended the powers of an heir of entail in possession, and relaxed the strictness of the fetters, until now the heir in possession, under an entail dated prior to the passing of the Entail (Scotland) Act, 1914, has nearly the same powers as a fee-simple proprietor, with this limitation, that he has to obtain the authority of the Court before he can exercise his powers, and has to follow the methods laid down in the Entail Statutes in order to obtain that authority, and in some cases to compensate the next heirs entitled to succeed to the estate under the deed of entail before he can carry out his intentions. The steps by which this result has been reached may be traced by briefly noticing the changes introduced by each of the Entail Amendment Acts in their chronological order.

### SECTION 3.—THE MONTGOMERY ACT.

**430.** The first of these Acts (with the exception of two short Acts passed in 1747,<sup>1</sup> to enable entail proprietors to sell land to the Crown for the purpose of erecting buildings in the Highlands) was the Montgomery Act, 1770,<sup>2</sup> which relaxed the fetters only with a view to the beneficial management of the estate. To encourage heirs in possession to improve their estates, it enacted that any heir laying out money on such improvements as enclosing, planting, or draining, or erecting farmhouses and offices or outbuildings for the same, or building, repairing, or adding to a mansion-house (since known as Montgomery Improvements), should be the creditor of the succeeding heirs of entail for three-fourths of the sum so expended, up to four years' free rental of the estate; and it also authorised the granting of leases and tacks for fourteen years and for the life of one person to be named in such tacks or leases, and in being at the time of making thereof; or for the lives of two persons to be named therein, and in being at the time of making the same, and the life of the survivor of them; or for any number of years not exceeding thirty-one years; building leases for ninety-nine years; and excambions of small portions of the estate specified as to extent.

### SECTION 4.—THE ABERDEEN ACT.

**431.** The Aberdeen Act, 1824,<sup>3</sup> was concerned with the disabilities of the heir in possession in providing for his family, and conferred on him the important privilege of burdening the rental of the entailed estate with provisions (known as Aberdeen Provisions) for his widow and children; the widow's provision to be a liferent provision by way of annuity not exceeding one-third of the free yearly rental of the estate (or, in the case of a surviving husband, where the heir in possession was a female, not exceeding one-half of the free yearly rental), and the children's provision a sum varying in amount according to the number of children but in no case to exceed three years' free rental of the estate.

<sup>1</sup> 20 Geo. II. cc. 50 and 51.

<sup>2</sup> 10 Geo. III. c. 51.

<sup>3</sup> 5 Geo. IV. c. 87.

SECTION 5.—THE ACTS OF 1836 TO 1845.

**432.** The only new power introduced in the Rosebery Act, 1836,<sup>1</sup> was a power to sell such portions of the estate as might be necessary to pay off the debts of the entailer which affected the estate. But it extended the powers given under the Montgomery Act, and allowed the heir in possession to grant leases, at a fair rent and notwithstanding any prohibition as to diminution of rental, for twenty-one years, independent of the tenants' lives; to lease minerals for thirty-one years; and to excamb any portion of the estate, exclusive of the mansion-house and policies, which did not exceed in value one-fourth of the whole estate. Three short Acts were passed in 1838, 1840, and 1841, of small importance; but the Lands Clauses Consolidation (Scotland) Act, 1845,<sup>2</sup> allowed the heir to sell such portions of the estate as were required by public bodies who had obtained compulsory powers under Act of Parliament.

SECTION 6.—THE RUTHERFURD ACT.

**433.** A great advance was made in the relaxations of the fetters of an entail, and a radical change was made in the position of the heir, by the Rutherfurd Act, 1848,<sup>3</sup> which first gave the heir in possession power to disentail. It was considered right in this Act (the effect of which is discussed at length by Lord President Inglis in *Black v. Auld*)<sup>4</sup> to distinguish between entails existing at the passing of the Act and those which might be subsequently granted. This led to the terms "old" and "new" entails, *i.e.* entails dated before or after 1st August 1848. In two sets of circumstances was it made possible for an heir in possession, being of full age, to acquire the estate in fee-simple without any consents, namely, first, where, irrespective of the date of the entail, the heir had been born subsequent to that date and subsequent to the passing of the Act; and secondly, where, under an old entail, he was unmarried and the only existing heir of entail. It is unnecessary at this stage to enter minutely into the circumstances under which an heir of entail could disentail with the consents of other heirs, or what consents it was necessary for the heir in possession, whether under a new or old entail, to obtain before he could disentail;<sup>5</sup> but in no case, except the two mentioned above, was it possible for him to disentail, unless (1) such consents were voluntarily given, (2) he himself was of full age, and (3) the heir-apparent consenting was of the age of twenty-five. Generally speaking, it was made easier for an heir in possession under an old entail to acquire the estate in fee-simple than for an heir in possession under a new entail to do so.

**434.** In addition to the power to disentail, the heir in possession might sell, charge, lease, and feu, with the like consents as enabled him

<sup>1</sup> 6 & 7 Will. IV. c. 42.

<sup>2</sup> 8 & 9 Vict. c. 19, ss. 7-9.

<sup>3</sup> 11 & 12 Vict. c. 36.

<sup>4</sup> 1873, 1 R. 133, at p. 144.

<sup>5</sup> See para. 473, *infra*.

to disentail; and an heir under an old entail might also excamb with certain other consents. Where the heir in possession had executed improvements of the nature of Montgomery improvements before the passing of the Act, and had obtained decree for three-fourths of the sum expended thereon, he might charge the estate with a bond of annual-rent for the three-fourths of the amount so expended, and where he had executed such improvements after the passing of the Act, with a bond of annual-rent for the whole sum; or he might charge the fee and rents of the estate with a bond and disposition in security for two-thirds of the amount of such bonds of annual-rent. He might make his children's provisions a burden on the fee of the estate; and in every case where he had power to burden, he might sell any portion of the estate, except the mansion-house, offices, and policies, sufficient to pay off the bond. For the first time in the Entail Acts the creditors of the heir in possession were brought into consideration, and power was given them to affect the entailed estate for their debts in all cases where the heir in possession was entitled to disentail without consents, and to object to the heir in possession disentailing, or to any other heir consenting to a disentail, where such a proceeding would affect their debts. Power was also given to the heir under an old entail to grant feus or long leases of any portion of the estate, not exceeding one-eighth part of the value of the entailed estate, on giving notice to the next heir.

**435.** Two important novelties were introduced in this Act as to the construction of deeds of entail: one to the effect that, where the deed contains a warrant to record the entail, this implies the inclusion in the deed of valid irritant and resolute clauses; the other, that an entail defective as to one of the cardinal prohibitions is defective as to all of them; which abolishes the distinction previously existing between entails binding on third parties and those only binding *inter hæredes*. A further important provision of this Act deals with estates settled in trust or by a series of liferents, and enacts that, on the succession opening to an heir born after the date of the deed, he shall be fee-simple proprietor.

#### SECTION 7.—THE ACTS OF 1853 TO 1878.

**436.** The Entail Amendment Act, 1853,<sup>1</sup> which mainly deals with procedure under the Entail Acts, extends the power as to feuing and building leases, conferred by the Act of 1848 on heirs under an old entail, to heirs under a new entail. It also contains clauses allowing the heir to grant bonds and dispositions in favour of any persons advancing the amount of younger children's provisions, provided the children discharge their provision, or that the money advanced is consigned in bank for their benefit, and a clause extending the power of sale to pay entailer's debts which actually affect the estate, to such debts as may be made to affect the estate. A short Act in 1860 was followed by the

<sup>1</sup> 16 & 17 Vict. c. 94.



Entail Amendment (Scotland) Act, 1868,<sup>1</sup> which conferred on the heir the power to feu any part of the estate without any consents, but subject to the approval of the Sheriff as to the amount of feu-duty to be charged; and also authorised him to consent to the heir-apparent's granting provisions for his younger children. Entailer's debts, or other debts which might be lawfully made to affect the fee of the estate, might be charged on the estate by bond and disposition in security; and the provisions of the Rutherfurd Act respecting heritable property conveyed by a trust deed or a series of liferents were extended to personal or moveable estate.

**437.** The Titles to Land Consolidation Act, 1868,<sup>2</sup> contains one important alteration (s. 14) in the construction of deeds of entail, and enacts that the registration clause in the deed shall be held to imply the cardinal prohibitions as well as the irritant and resolute clauses, which, as stated above, were held to be implied in virtue of the provisions of the Rutherfurd Act.

**438.** The Entail Amendment (Scotland) Act, 1875,<sup>3</sup> followed by a short Act in 1878, made an important alteration as to the consents without which the heir could not up to that time disentail, sell, burden, etc., the estate. The age at which the next heir might give his consent was reduced from twenty-five to twenty-one years, and, more important still, the consents of all heirs other than the nearest, if refused, might be valued by the Court; and on such value in money being consigned in bank by the heir in possession, or on sufficient security over the estate being given therefor, such consents might be dispensed with. Power was also given to heirs to borrow in anticipation of expenditure on improvements. Two further important clauses provided that issue of a younger child who predeceased the heir might take their father's share of the provisions for younger children, and that, where the succession to the estate opened to an "heir whomsoever" under the destination, he was to be held to be fee-simple proprietor without any declarator.

#### SECTION 8.—THE ACT OF 1882.

**439.** The Act of 1882<sup>4</sup> introduced changes almost as important as those of the Rutherfurd Act. By enacting that heirs possessing under new entails might disentail, etc., with the same consents as heirs possessing under old entails, it practically abolished the difference between old and new entails. By allowing the appointment of a curator to the nearest heir, if under age, who might consent for him, and by authorising the Court to dispense with his consent if it were refused, it makes it possible for any heir, *capax* and of full age, to disentail whenever he pleases; while by enacting that a creditor of the heir in possession, in respect of debts incurred after the passing of the Act, may compel a disentail, it has put it out of the power of an heir under such circum-

<sup>1</sup> 31 & 32 Vict. c. 84.

<sup>3</sup> 38 & 39 Vict. c. 61.

<sup>2</sup> 31 & 32 Vict. c. 101.

<sup>4</sup> 45 & 46 Vict. c. 53.

stances to prevent a disentail. The magnitude of these alterations in the position of an heir of entail in possession dwarfs two other provisions of this Act, in themselves sufficiently important, namely, that he may sell the whole estate without any consents at the sight of the Court and without any restriction as to the portion sold being only sufficient to pay entailer's debts, and that he may charge three-quarters of the amount expended on improvements on the estate, instead of merely two-thirds as previously. Provision is also made in this Act for the event of an heir in possession or any other heir of entail disappearing.

#### SECTION 10.—THE ACT OF 1914.

**440.** Up till 1914 the Acts which have been briefly summarised above formed a code regulating the nature of entails and the rights of parties interested in entailed estates. As regards existing entails little change was made by the Entail (Scotland) Act, 1914,<sup>1</sup> save that by s. 3 it is provided that when the value of the expectancy of an heir has been ascertained it shall not be necessary to consign the ascertained sum in bank, provided security be given over the entailed estate, and by s. 4 power is given to the heir in possession, notwithstanding any prohibition in the deed of entail or in any Act of Parliament, to grant feus of any part of the estate, save certain excepted portions, at such feu-duty as he shall think fit, with the consent of the nearest heir of lawful age, and not subject to legal incapacity, or failing his consent, or if the nearest heir is not of lawful age, upon a finding by the Sheriff that the granting of the feu is in accordance with the provisions of the section, and that the feu-duty is fair and reasonable. Under s. 4 the heir in possession is prohibited from feuing more than ten acres to or for behoof of the same person, and from taking any grassum or consideration other than feu-duty. The Act makes certain further provisions as to obligations in leases granted by heirs of entail regarding sheep stock, and as to contracts entered into by them for the sale of growing timber, which will be dealt with later.<sup>2</sup> By s. 8 the provisions of the Rutherford Act respecting heritable property conveyed by a trust deed or a series of liferents or by tack, which only applied to deeds or writings dated on or after 1st August 1848, were extended to all such deeds or writings irrespective of their date.

**441.** The radical change in the law of land rights in Scotland was, however, made by s. 2 of the 1914 Act, which, subject to certain provisions as to date of operation, prohibits the making of fresh entails. The section itself will be discussed later. For practical purposes it should be borne in mind that, as regards subsisting entails, the law as amended by the 1914 Act is still in force, and that, as much of the land of Scotland is still held under entail, there is little likelihood of the entail statutes falling into desuetude for a considerable period. In

<sup>1</sup> 4 & 5 Geo. V. c. 43.

<sup>2</sup> See paras. 517 and 519, *infra*.

this article it will be convenient to deal separately with entails prior to 1914, and afterwards with the effect of the 1914 Act.

**442.** An heir of entail can only exercise the majority of the powers conferred by these various statutes on obtaining the authority of the Court, which in some cases includes the Sheriff and Sheriff-Substitute.<sup>1</sup> This authority is obtained by means of petition, setting forth the full circumstances of each case; and the prayer is only granted after the Court has satisfied itself, by means of remit to reporters and men of skill, that the heir in possession is entitled to exercise the power craved, that the facts have been correctly stated, that the provisions of the Entail Acts have been complied with, and that all persons entitled to object to the granting of the petition have had intimation thereof.

## PART II.—ENTAILS PRIOR TO 1914.

### SECTION 1.—TITLE TO MAKE AN ENTAIL.

**443.** Prior to the Act of 1914 the only title requisite on the part of an entailer was the possession of a proper real or personal right to the estate or subject of disposition. He need not be feudally infeft: a personal right was sufficient to enable him to make a deed which would be effectual to compel his heir to fulfil the intention, or which would be valid on the making-up of the proper titles;<sup>2</sup> but a gratuitous deed of entail, made by an heir in possession upon his apparency, is not binding upon those entitled to the succession, who, if they choose, may pass him over and serve to the last infeft.<sup>3</sup> Where a person had bound himself, as in a marriage contract, to settle his estates in a special way, he had no power to create an entail of the estates so as to avoid the obligation;<sup>4</sup> but where he conveyed his estate for behoof of creditors, he had still a valid right to entail whatever remained by way of reversion.<sup>5</sup>

### SECTION 2.—SUBJECTS SUITABLE TO AN ENTAIL.

#### SUBSECTION (1).—*Lands, etc.*

**444.** The Statute of 1685 applies only to subjects capable of being feudalised, hence these only can be the proper subjects of an entail binding both heirs and third parties; but an entail binding *inter hæredes* can be made of heritable rights which cannot be feudalised, such as of leases by assignation<sup>6</sup> or rights of reversion. Any such subjects as

<sup>1</sup> See paras. 539 *et seq.*, *infra*.

<sup>2</sup> *Livingstone v. Napier*, 1762, 5 Bro. Supp. 885 and 888; 2 Ross's L.C. 425; *Renton v. Anstruther*, 1843, 2 Bell's App. 214; 2 Ross's L.C. 435; *Earl of Fife v. Duff*, 1862, 24 D. 936; 1863, 4 Macq. 469.

<sup>3</sup> *Marquis of Clydesdale v. Earl of Dundonald*, 1726, Mor. 1262 (Branch v. at p. 1274).

<sup>4</sup> *Munro v. Munro*, 13th February 1810, F.C.; *Macleod v. Macleod*, 1828, 6 S. 1043.

<sup>5</sup> *M'Millan v. Campbell*, 1834, 7 W. & S. 441.

<sup>6</sup> *Maule v. Maule*, 4th March 1829, 4 F.C. 704; *Earl of Dalhousie v. Ramsay-Maule*, 1782, Mor. 10963; and see *Chisholm v. Chisholm-Batten*, 1864, 3 M. 202, at p. 226.



lands, houses, even a theatre,<sup>1</sup> teinds, fishings, are the proper subjects of an entail. Patronages might also be held under a deed of entail, but where compensation had been found due or payable to an heir of entail under and in virtue of the provisions of the Church Patronage Act, 1874,<sup>2</sup> the heir succeeding to the entailed estates was not entitled to claim any part of the patronage compensation, which was personal to the heir in possession who first claimed it, and was, accordingly, in so far as not paid to him, payable to his executor and not to the next heir of entail.<sup>3</sup> Adjudications completed by infestment, even before the expiry of the legal, may be strictly entailed,<sup>4</sup> as also may a *pro indiviso* interest in a heritable estate;<sup>5</sup> and on the division of the estate among the *pro indiviso* proprietors, the entail applies to the portion allocated to the heir of entail.<sup>6</sup> Moveables are not proper subjects of entail, even *inter hæredes*.<sup>7</sup>

#### SUBSECTION (2).—"Entailed Money."

**445.** While money as forming part of moveable estate cannot be the subject of an entail, statute has provided that certain moneys, known as "entailed money," shall be regarded as a *surrogatum* for entailed lands. This term applies to money acquired or held in trust under and in virtue of s. 25 and subsequent sections of the Rutherford Act, 1848,<sup>8</sup> and s. 8 of the Entail Act, 1853,<sup>9</sup> which deal with money to be expended in the purchase of land to be entailed, or which accrues from the sale or surrender of entailed lands under the powers conferred by these statutes. Such money may, in so far as permitted by the above statutes, be acquired by the heir in possession in fee-simple, but in so far as not so acquired and in so far as not utilised for the statutory purposes, it remains entailed money.

**446.** As regards money payable in respect of lands taken or purchased from heirs of entail as compensation under the Lands Clauses Consolidation (Scotland) Act, 1845,<sup>10</sup> the provisions as to its payment and application are contained in ss. 67 *et seq.* of that Act. They will be found not to differ to any great extent from the provisions in the Entail Acts, save that, under the provisions of the latter Acts, if the entailed money, after the authorised purposes of the Acts have been fulfilled, amounts to less than £200, it is paid to the heir of entail in possession for his own use and behoof, while under the Lands Clauses Act if the compensation exceeds £200, it is directed (s. 67) to be paid into bank to be applied, under the authority of the Court of Session, to certain specified purposes; if it is under £200 but exceeds £20, it may either

<sup>1</sup> *Brown v. Soutar*, 1870, 8 M. 702.

<sup>2</sup> 37 & 38 Vict. c. 82.

<sup>3</sup> *Paterson v. Paterson*, 1888, 15 R. 1060.

<sup>4</sup> *Dalyell v. Dalyell*, 17th January 1810, F.C.; see also *Leslie v. Dick*, 1710, Mor. 15358.

<sup>5</sup> *Stirling v. Dunn*, 1827, 6 S. 272; *affd.* 3 W. & S. 462.

<sup>6</sup> *Howden v. Rocheid*, 1869, 7 M. (H.L.) 110.

<sup>7</sup> *Kinnear v. Kinnear*, 1877, 4 R. 705; *Sandys v. Bain's Trs.*, 1897, 25 R. 261; *Baillie v. Grant*, 1859, 21 D. 838; but see *Marquis of Bute v. Lady Bute's Trs.*, 1880, 8 R. 191, and *Adams' Trs. v. Wilson*, 1899, 1 F. 1042.

<sup>8</sup> 11 & 12 Vict. c. 36.

<sup>9</sup> 16 & 17 Vict. c. 94.

<sup>10</sup> 8 Vict. c. 19.

be paid into bank and applied as aforesaid, or it may be paid direct to two trustees nominated by the heir of entail in possession, to be applied by them as aforesaid but without the leave of the Court; if it does not exceed £20, it is paid to the heir of entail in possession for his own use and behoof. The subsequent Entail Acts up till 1882 made little change regarding entailed money, save that by s. 9 of the Entail Amendment Act, 1868,<sup>1</sup> provision is made for the application by the heir of entail in possession, where the whole or part of an entailed estate has been sold, for the appointment of trustees by whom the price or balance thereof may be invested on heritable security in Scotland or applied by them in accordance with the provisions of the Entail Acts.

**447.** As already stated, the provisions as to the power of sale by heirs of entail in possession are greatly extended by the Entail (Scotland) Act, 1882.<sup>2</sup> Sales are conducted under the authority of the Court (s. 23), which may either direct the price to be consigned in bank in money or in consolidated stock, or if the applicant desires that it should be invested in certain stocks or securities to be approved by the Court, it may be invested as entailed money in the names of trustees to be appointed by the Court, who shall be not less than three in number, may receive remuneration fixed by the Court, and shall hold the investments for behoof of the applicant and the heirs of entail in their order. By s. 27 it is provided that the price of an entailed estate or any part thereof shall be entailed estate within the meaning of the Entail Acts, thus supplementing the definition in s. 3 of the Entail Amendment Act, 1875, which defined "entailed estate" as, *inter alia*, "all money or other property, real or personal, invested in trust for the purpose of purchasing land to be entailed, and also all money consigned in respect of the taking of any land forming part of an entailed estate." By s. 28 it is provided that the provisions of the Act with regard to the descriptions of securities and stocks in which the price of land sold may be invested shall apply to all entailed estate consisting of money.

**448.** The Entail (Scotland) Act, 1914,<sup>3</sup> is silent as to entailed money, but it should be noted that money vested in trustees for the purchase of land in Scotland to be entailed is "entailed estate" within the meaning of the Finance Act, 1894,<sup>4</sup> and that by the provisions of the Trusts (Scotland) Act, 1921,<sup>5</sup> very extended powers of investment are given to all trustees, whether appointed by the Court or otherwise, unless specially prohibited by the constitution or terms of the trust.

### SECTION 3.—PARTICULAR SUBJECTS FORMING PART OF ENTAILED ESTATE.

#### SUBSECTION (1).—*Mansion-house.*

**449.** The mansion-house of an estate with its appurtenances and accessories as such is an appanage of the estate, designed for the residence

<sup>1</sup> 31 & 32 Vict. c. 84.

<sup>2</sup> 45 & 46 Vict. c. 53.

<sup>3</sup> 4 & 5 Geo. V. c. 43.

<sup>4</sup> *Lord Advocate v. Stewart*, 1902, 4 F. (H.L.) 11.

<sup>5</sup> 11 & 12 Geo V. c. 58.

of the heir in possession for the time being. Whether a particular house is the mansion-house of an estate in this sense is a question of fact to be determined by common sense, looking to the purpose for which the house was built, and the use to which it has been put by the proprietors;<sup>1</sup> and there may be more than one house upon an estate entitled to be so called;<sup>2</sup> or, where two contiguous estates are destined to the same series of heirs under entails, both of which contain the same conditions, but one of which is stated to be subsidiary to the other, and where the mansion-house stands exclusively on one of the estates, the rents of both estates may be computed in reference to repairs on the mansion-house which has always been inhabited by the heir in possession of both estates.<sup>3</sup>

**450.** The legal questions which have arisen in this connection have had reference chiefly to cases in which *pro indiviso* rights are created by law, or in questions as to the powers and rights of limited proprietors, *e.g.* liferenters or heirs of entail. The first class is illustrated in the case of the succession of heirs-portioners. In the case of persons having only a limited or fiduciary title to the estate, as, for example, liferenters and heirs of entail, their powers of dealing with the mansion-house, as with the estate in general, are limited at common law to such acts as fall within a fair and ordinary administration, consistent with the legitimate interests of their successors. In the case of heirs of entail, these powers are largely regulated by statute. And, save under compulsory powers or in virtue of a private Act, or in accordance with the provisions of the Entail Acts, the mansion-house, with its appurtenances, cannot be diverted from its proper use as the residence of the heir in possession for the time being.<sup>4</sup>

**451.** Thus while at common law, and in the absence of special provisions in the deed of entail, an heir of entail in possession cannot be compelled at the instance of succeeding heirs to maintain and repair the mansion-house,<sup>5</sup> or to rebuild it if destroyed by fire, he is not entitled to pull it down and sell the materials for his own benefit, and may be prevented from doing so by interdict at the instance of substitute heirs,<sup>6</sup> this being in no sense a reasonable or ordinary use of the subject. An heir of entail is under no obligation to insure the mansion-house; but if he do so, and the mansion-house be destroyed by fire, a succeeding heir cannot insist upon his laying out the price in building it anew.<sup>7</sup> Such obligations, *viz.* to repair and maintain the mansion-house, to insure and rebuild in case of fire, to reside therein, etc., may of course

<sup>1</sup> *Montgomerie v. Vernon*, 1895, 22 R. 465, per Lord M'Laren at p. 473.

<sup>2</sup> *Marquis of Ailsa*, 1853, 15 D. 308; *Stirling v. Dalrymple*, 14th December 1814, F.C.; *Earl of Breadalbane v. Jamieson*, 1877, 4 R. 667, per Lord Pres. Inglis at p. 669.

<sup>3</sup> *M'Donald v. Lockhart*, 1835, 14 S. 150.

<sup>4</sup> Rankine, *Land-Ownership*, 4th ed., p. 714.

<sup>5</sup> *Menzies, Conv.*, p. 738; Sandford on Entails, p. 281; *Earl of Breadalbane, supra*, per Lord Craighill, Ordinary, at p. 668.

<sup>6</sup> *Gordon v. Gordon*, 24th January 1811, F.C.

<sup>7</sup> Rankine, *Land-Ownership*, 4th ed., p. 715.



be made matter of express condition in the deed of entail.<sup>1</sup> On the other hand, it has been held that an heir of entail may pull down the mansion-house, provided that he shall *bona fide* immediately build another equally good, upon a site equally suitable for the estate.<sup>1</sup> The danger attendant upon such a course, however, is shewn by a subsequent case, in which the mansion-house had been pulled down in order to rebuild, but the heir of entail died before completing it. It was held that the obligation to complete the rebuilding did not transmit against the personal representatives of the deceased heir.<sup>2</sup>

**452.** The power of an heir of entail to cut wood or trees in the neighbourhood of the mansion-house is also limited to what is consistent with a fair and proper administration; and the Court will interfere to protect succeeding heirs against any abuse of this power involving deterioration of the residential character and amenity of the mansion-house and policies.<sup>3</sup> The case of *Hamilton*<sup>4</sup> appears to be a decision to the contrary, but in that case, apparently, the point was not taken that the cutting down of a plantation near the mansion-house would interfere with its amenity. The powers of heirs of entail as regards growing timber are discussed later.<sup>5</sup>

**453.** In older deeds of entail it was usual to except the mansion-house and accessories from the powers of leasing thereby conferred upon the heir. Apart, however, from special provisions, the mansion-house and offices have always been treated in our law as falling under exceptional rules. So it has long been settled that the power of an heir of entail to lease the mansion-house is limited to the lifetime of the granter,<sup>6</sup> but this rule has been subjected to a slight modification by the Entail (Scotland) Act, 1914,<sup>7</sup> which provides that where, at the death of an heir of entail, the mansion-house, offices, gardens, and policies are let in whole or in part, the lease shall not be determined until the term of Whitsunday or Martinmas occurring not less than three months after the death, and that the rent for the period between the death and the termination of the lease shall be payable to the next heir or heirs of entail who shall succeed to the estate. So, also, tutors and curators cannot, in general, lease the mansion-house for a period extending beyond the term of guardianship.<sup>8</sup> But this rule does not extend to a house not originally built as a mansion-house, nor occupied as such by the proprietor, albeit the only suitable proprietary residence on the estate.<sup>9</sup> The various Entail Statutes have maintained this distinction between the mansion-house and offices and the general estate. Thus,

<sup>1</sup> *Moir v. Graham*, 1826, 4 S. 730.

<sup>2</sup> *Earl of Breadalbane*, *supra*, per Lord Pres. Inglis at pp. 671-672.

<sup>3</sup> *Boyd v. Boyd*, 1870, 8 M. 637; *Dickson v. Dickson*, 1823, 2 S. 152; *M'Kenzie v. M'Kenzie*, 1824, 2 S. 775; *Bontine v. Graham's Trs.*, 1827, 6 S. 74.

<sup>4</sup> 1757, Mor. 15408

<sup>5</sup> See para. 519, *infra*.

<sup>6</sup> *Lord Cathcart v. Schaw*, 1755, Mor. 15399, at p. 15403; *Leslie v. Orme*, 1780, 2 Pat. App. 533; 1779, Mor. 15530; *Sandford on Entails*, p. 230 n.

<sup>7</sup> 4 & 5 Geo. V. c. 43, s. 6.

<sup>8</sup> *Hill*, 1851, 14 D. 13; *Spiers*, 1854, 17 D. 289.

<sup>9</sup> *Montgomerie v. Vernon*, 1895, 22 R. 465.

the manor place, offices, houses, gardens, etc., usually in the natural possession of the proprietor, or which have not usually been let for a longer term than seven years, until the heir in possession was of lawful age, and land within 300 yards thereof, are excluded from the powers of leasing conferred by the Montgomery Act,<sup>1</sup> so long as the house is clearly the mansion-house of the estate.<sup>2</sup> A similar prohibition attached to any tack of the home farm, mansion-house, or policies in the Rosebery Act<sup>3</sup> for any period beyond the granter's lifetime, and also to excambions of these subjects.<sup>4</sup> The powers to grant feus, long leases, or building leases conferred by the Rutherfurd Act,<sup>5</sup> and the amending Act of 1853,<sup>6</sup> contain a similar exception, and this exception is repeated, as regards the mansion-house in the Entail (Scotland) Act, 1914,<sup>7</sup> while as regards the offices, policies, etc. it is provided that they shall not be feued, in so far as they are necessary to the amenity of the mansion-house. Accordingly, in order to feu or lease the mansion-house an heir of entail must proceed by obtaining the necessary consents, as in the case of a disentail. Similarly, in cases where it is made competent by the Rutherfurd Act for an heir of entail in possession to charge the estate with debt, *e.g.* family provisions, power is given to him in certain circumstances to sell portions of the estate for payment of the debt, exclusive of the mansion-house, offices, and policies (s. 25). Where an estate possesses two mansion-houses it will be a question of fact whether or not both are entitled to be excluded. A mansion-house no longer possessing the character and amenity of the mansion-house of an entailed estate will not be excluded.<sup>8</sup>

**454.** In regard to the power to charge improvement expenditure, also, the statutes contain special provisions applying to the mansion-house and offices. By the Montgomery Act, ss. 27, 28, an heir of entail is entitled to stand creditor to the next succeeding heir to the extent of three-fourths of the cost of building or repairing the mansion-house or offices, provided that the sum does not exceed two years' rent under deduction of burdens (see also s. 8; and s. 9 of the Entail Amendment Act, 1853, as regards the application of money placed in trust for the purchase of land). In the construction of these sections, or in connection with improvements authorised by the Rutherfurd Act, s. 26, it has been held that the authority thus conferred does not cover a mansion-house which is *de facto* occupied by the estate factor;<sup>9</sup> or a shooting-lodge;<sup>10</sup> or a game-watcher's house on outlying parts of the estate;<sup>11</sup> or a racquet court.<sup>12</sup> On the other hand, it has been held to

<sup>1</sup> 10 Geo. III. c. 51, s. 6; *Turner v. Turner*, 6th December 1811, F.C.

<sup>2</sup> *Montgomerie v. Vernon*, 1895, 22 R. 465.

<sup>3</sup> 6 & 7 Will. IV. c. 42, s. 1.

<sup>4</sup> *Ibid.*, s. 4.

<sup>5</sup> 11 & 12 Vict. c. 36, s. 24.

<sup>6</sup> 16 & 17 Vict. c. 94, s. 6; see also 31 & 32 Vict. c. 84, s. 3.

<sup>7</sup> 4 & 5 Geo. V. c. 43, s. 4.

<sup>8</sup> *Logan*, 1911, 49 S.L.R. 26; 1911, 2 S.L.T. 322.

<sup>9</sup> *Marquis of Ailsa*, 1853, 15 D. 308.

<sup>10</sup> *Duke of Athole*, 1855, 17 D. 1015; *Davidson*, 1859, 21 D. 1086.

<sup>11</sup> *Marquis of Huntly*, 1857, 19 D. 818.

<sup>12</sup> *Earl of Eglinton*, 1857, 19 D. 346.

extend to a jointure-house; <sup>1</sup> a gamekeeper's house and dog-kennels; <sup>2</sup> expense attendant upon the introduction of water and gas, <sup>3</sup> and other necessary fixtures for a mansion-house; <sup>4</sup> the erection of milk and ice houses; <sup>5</sup> the building of garden walls; <sup>6</sup> a porter's lodge and gates; <sup>7</sup> and, with difficulty, a mausoleum. <sup>8</sup> In order to 'be chargeable under the Act, however, repairs must have some permanent character, and exceed the mere restoration of ordinary tear and wear. <sup>9</sup> The mansion-house, offices, and policies are not chargeable with provisions to younger children; <sup>10</sup> or improvement expenditure to be laid upon the fee and rents of the estate; <sup>11</sup> or with bonds of annual-rent under sec. 8 of the Entail Amendment Act, 1875. <sup>12</sup> In calculating the free yearly rental of the estate, the yearly value of the mansion-house, let or unlet, is not included. <sup>13</sup>

#### SUBSECTION (2).—*Mines and Minerals.*

See MINES AND MINERALS.

#### SUBSECTION (3).—*Timber.*

See below. <sup>14</sup>

### SECTION 4.—THE DESTINATION OF A DEED OF ENTAIL.

**455.** The strict principles of construction applied to the fettering clauses <sup>15</sup> are not applied to the interpretation of the destination. There is here no material difference between entailed and simple destinations. "The question is simply as to the meaning of the entailer in the words he has employed, there being no room for the strict principle of construction applicable to the fettering clauses." <sup>16</sup> It is, accordingly, not within the scope of this article to deal with the many decisions which have been pronounced as to the particular persons entitled to succeed to an entailed estate under an admittedly valid deed of entail. <sup>17</sup> The subject dealt with is concerned solely with the question of the validity or non-validity of destinations purporting to create entails. It is not competent by means of an entail to perpetuate the legal order of succession, and the destination must be to a special line of heirs. Thus an attempt to entail estates on A. and "his lawful heirs for ever," or

<sup>1</sup> *Agnew*, 1858, 20 D. 787.

<sup>2</sup> *Marquis of Huntly*, *supra*; see also *Munro*, 1856, 18 D. 994.

<sup>3</sup> *Earl of Eglinton*, *supra*; *Muirhead*, 1853, 15 D. 517.

<sup>4</sup> *Morison v. Earl of Kintore*, 1847, 9 D. 1394.

<sup>6</sup> *Fraser*, *supra*; *Carnegie*, 1856, 18 D. 323.

<sup>8</sup> *Fraser v. Lord Lovat*, 1840, 2 D. 684.

<sup>9</sup> *Fraser v. Lord Lovat*, *supra*; *Johnston*, 1856, 19 D. 68; cf. 38 & 39 Vict. c. 61, s. 3 (7).

<sup>10</sup> 11 & 12 Vict. c. 36, s. 21; *Leith v. Leith*, 1862, 24 D. 1059; cf. *Logan* (O.H.), 1911, 49 S.L.R. 26; 2 S.L.T. 322.

<sup>11</sup> 11 & 12 Vict. c. 36, s. 18; 31 & 32 Vict. c. 84, s. 11.

<sup>12</sup> 38 & 39 Vict. c. 61. <sup>13</sup> *Leith*, *supra*; *Heriot*, 1856, n.r.; *Duncan on Entails*, p. 391.

<sup>14</sup> See para. 519, *infra*.

<sup>15</sup> See Prohibitory Clauses, paras. 459 *et seq.*, *infra*.

<sup>16</sup> *Gordon v. Gordon's Trs.*, 1866, 4 M. 501, per Lord Barcaple at p. 532.

<sup>17</sup> *E.g. Dick-Lauder v. Leather-Cully*, 1920 S.C. 48; *Carnegy v. Joseph*, 1916 S.C. (H.L.) 39; *Forbes v. Trefusis*, 1873, 11 M. (H.L.) 44.



"heirs whatsoever," is a destination to A. in fee-simple,<sup>1</sup> even if heirs-portioners be excluded;<sup>2</sup> and where the destination is to a series of substitutes and ultimately to the "heirs whatsoever" of the entailor, or of the last substitute, then the last heir-substitute in possession becomes fee-simple proprietor,<sup>3</sup> and he may resettle the estates;<sup>4</sup> but the settlement would be defeated by the subsequent birth of an heir-substitute named in the original deed of entail.<sup>5</sup> Under such circumstances, as where the destination is taken in favour of the heir in possession and his "heirs whomsoever" or "heirs general," the estate is deemed and taken to be a fee-simple estate without any declarator or other judicial procedure.<sup>6</sup> A final destination importing to be to the entailor's heirs in blood, as "nearest of kindred" or "heirs direct or collateral," is a good entail destination.<sup>7</sup>

**456.** The succession must be lineal or without division, and thus failure to exclude heirs-portioners invalidates the entail;<sup>8</sup> but here the heirs-portioners take the estate in fee-simple, and not the substitute in possession immediately prior to the succession opening to them.<sup>9</sup> An intention to exclude heirs-portioners will not be inferred from other parts of the deed.<sup>10</sup> Where the succession was divided equally between the entailor's sisters, it was held that the succession vested in them in fee-simple, and that they were entitled to the same rights and remedies for dividing the property between them and vesting the shares of each in their own persons, by separate titles, as were competent to heirs-portioners in a fee-simple succession.<sup>11</sup> When in a destination particular heirs are described, those take who answer the description when the succession opens.<sup>12</sup> Where the destination in the deed of entail of one estate was to the heir of entail in possession and, ultimately, to the heirs-substitute in a deed of entail of another estate, and the other estate was disentailed, it was held that the destination in the first deed of entail remained operative, as it was not qualified by the condition that the successive heirs should be in possession;<sup>13</sup> but where the destination imported to be to "the heirs of entail in possession" of another entailed estate, the disentail of that estate voided the former destination.<sup>14</sup>

<sup>1</sup> *Leny v. Leny*, 1860, 22 D. 1272.

<sup>2</sup> *Macgregor v. Gordon*, 1864, 3 M. 148, per Lord Pres. McNeill and Lord Barcaple at p. 154; *Primrose v. Primrose*, 1854, 16 D. 498.

<sup>3</sup> *Stair*, ii. 3, 43; *Ersk.* iii. 8, 32; *Earl of March v. Kennedy*, 1760, Mor. 15412; 2 Pat. App. 49; *Colvill v. Colvill*, 1842, 5 D. 372; 1845, 4 Bell's App. 248.

<sup>4</sup> *Earl of March*, *supra*.

<sup>5</sup> *Mackinnon v. Mackinnon*, 1756, Mor. 14938 and 6566.

<sup>6</sup> Entail Amendment Act, 1875 (38 & 39 Vict. c. 61, s. 13).

<sup>7</sup> *Collow's Trs. v. Connell*, 1866, 4 M. 465; *Moubray's Trs. v. Moubray*, 1895, 22 R. 801.

<sup>8</sup> *MacDonald v. Lockart*, 1842, 5 D. 372; *Farquhar v. Farquhar*, 1838, 1 D. 121.

<sup>9</sup> *Collow's Trs.*, *supra*, per Lord Pres. McNeill at p. 470; *Mure v. Mure*, 1837, 15 S. 581; 1838, 3 S. & M'L. 237.

<sup>10</sup> *Farquhar*, *supra*; *Leny*, *supra*.

<sup>11</sup> *Sands v. Sands*, 1844, 6 D. 365.

<sup>12</sup> *Shepherd v. Grant*, 1836, 15 S. 173; 1838, 3 S. & M'L. 255, per L.C. at p. 281; *Martin v. Kelso*, 1853, 15 D. 950; 1857, 2 Macq. 556; *Ker v. Innes*, 1810, 5 Pat. 320.

<sup>13</sup> *Inglis v. Gillanders*, 1894, 22 R. 266; 1895, 22 R. (H.L.) 51.

<sup>14</sup> *Schank v. Schank*, 1895, 22 R. 845.

SECTION 5.—THE ESSENTIAL CLAUSES OF A DEED OF ENTAIL.

SUBSECTION (1).—*General.*

**457.** These are: (1) The prohibitory clauses aimed against the alienation of the estate, the contraction of debt affecting the estate, and the alteration of the order of succession by the heir of entail in possession. These three prohibitions are called the “cardinal prohibitions,” being essential effectually to fetter the heir in possession, who is the fiar of the estate and therefore at liberty to deal with it as he wills, in so far as not restrained by the prohibitions; (2) the irritant clauses declaring that all deeds executed in contravention of the prohibitions shall be null and void; and (3) the resolute clauses declaring that any heir of entail in possession contravening any of the prohibitions shall forfeit his right to the estate, sometimes for himself and sometimes for all those heirs who might take as his descendants. The statute of 1685 did not attempt to give any technical definition of these clauses, but it did enact that it was not sufficient that they should only appear in the original deed of entail, but that they must be repeated *ad longum* in every subsequent deed and instrument necessary to the conveyance of the estate.

**458.** The effect of the essential clauses, and their construction, proved a fruitful source of litigation, each deed of entail having to be construed separately. A series of enactments have, however, been passed which avoid any question as to what constitute valid, prohibitory, irritant, and resolute clauses in a deed of strict entail, and dispense with the necessity of their repetition *ad longum* in each conveyance of the estate. The Titles to Lands Consolidation (Scotland) Act, 1868,<sup>1</sup> provides that where a deed of entail contains an express clause authorising registration of the deed in the Register of Tailzies, it shall not be necessary to insert clauses of prohibition against alienation, contracting of debt and altering the order of succession, and irritant and resolute clauses, or any of them; and that such clause of registration contained in any deed of entail of lands not held by burgage tenure, dated on or after 1st October 1858, or of lands held burgage tenure, dated on or after 10th October 1860, shall have the same operation and effect as if the prohibitory, irritant, and resolute clauses had been inserted in the deed. Thus, in a modern deed of entail, a clause authorising registration may take the place of the prohibitory, irritant, and resolute clauses, and all questions in a deed of entail containing such a clause as to the efficacy of the prohibitory, irritant, and resolute clauses will be avoided. And by s. 9 of the same Act <sup>2</sup> it is provided that it is sufficient in any conveyance of an entailed estate to refer to any prior recorded conveyance of the estate which forms part of the progress of titles of the lands under

<sup>1</sup> 31 & 32 Vict. c. 101, s. 14 (consolidating 11 & 12 Vict. c. 36, s. 39; 21 & 22 Vict. c. 76, s. 18; 23 & 24 Vict. c. 143, s. 12).

<sup>2</sup> Consolidating 10 & 11 Vict. c. 48, ss. 3, 4, and 5; c. 51, s. 26; 21 & 22 Vict. c. 76, s. 17; 23 & 24 Vict. c. 143, ss. 11, 27.

the deed of entail, and which contains in full the destination of heirs or the prohibitory, irritant, and resolute clauses, or the clause authorising registration of the deed of entail in the Register of Tailzies as contained in the original deed of entail. And such a reference is equivalent, whatever the date of the deed of entail, to a full repetition of the said clauses.

SUBSECTION (2).—*The Prohibitory Clauses.*

(i) *General Rule of Construction.*

**459.** The Statute of 1685 contains no technical definition of the prohibitions,<sup>1</sup> but the rule of construction is in favour of freedom from the fetters, and no limitation will be implied or inferred which is not clearly expressed, nor will it be deduced from any other prohibition.<sup>2</sup> "If an expression in an entail admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail, rather than that which supports it";<sup>3</sup> but a malignant construction of the prohibition is now to be avoided in view of the modifications made by statute. "Entails have been so modified and relaxed that they are no longer, so to speak, hated by the law, but they are, in some respects, favoured, as the Legislature has provided a short clause by means of which they can be effectually made."<sup>4</sup> To be complete the fettering clauses must appear in the body of the deed of entail,<sup>5</sup> and not merely be referred to as existing in another deed of entail.<sup>6</sup> It is provided by s. 43 of the Rutherfurd Act, 1848,<sup>7</sup> that where an entail is invalid under the statute of 1685 in respect of any one of the prohibitions, it shall be invalid as regards them all.

(ii) *The Prohibition against Alienation.*

**460.** This can no longer be regarded as a prohibition in view of the provisions of the Entail Acts, culminating in the Entail (Scotland) Act, 1882,<sup>8</sup> the provisions of which give the heir in possession complete and uncontrolled power of alienation, no matter what the date of the entail. The changes effected by statute are discussed later.<sup>9</sup> Apart from statute, however, gratuitous alienation of the estate is not excluded by a prohibition to sell.<sup>10</sup> A clause prohibiting the heirs from selling, alienating, impignoring, or disposing the lands, "either redeemably or under

<sup>1</sup> *Gilmour v. Cadell*, 1838, 16 S. 1261, per Lord Corehouse at p. 1267.

<sup>2</sup> *Lang v. Lang*, 1839, Macl. & Rob. 871, per L.C. at p. 885; *Fraser v. Fraser*, 1879, 7 R. 134; *Cathcart v. Cathcart*, 1863, 1 M. 759.

<sup>3</sup> *Lumsden v. Lumsden*, 1843, 2 Bell's App. 104, per Lord Campbell at p. 114.

<sup>4</sup> *Wallace v. Wallace's Trs.*, 1880, 7 R. 902, per Lord Gifford at p. 906.

<sup>5</sup> *Kenny v. Taylor*, 1875, 2 R. 636; *Gammell v. Cathcart*, 1849, 12 D. 19; 1852, 1 Macq. 362.

<sup>6</sup> *Stewart v. Stewart*, 1844, 6 D. 1073; *Lindsay v. Earl of Aboyne*, 1842, 4 D. 843.

<sup>7</sup> 11 & 12 Vict. c. 36.

<sup>8</sup> 45 & 46 Vict. c. 53.

<sup>9</sup> See paras. 483 *et seq.*, *infra*.

<sup>10</sup> *Russell v. Russell*, 1852, 15 D. 192.



reversion," is bad, and does not suffice to debar the heir in possession from selling the whole lands and appropriating the price.<sup>1</sup> But a deed of entail containing a prohibition against sale, duly fenced, and also a qualified permission to sell under certain conditions which must be faithfully observed, will be upheld as a good deed of entail, provided that the reserved power does not absolutely defeat the general prohibition,<sup>2</sup> and that even where the heir of entail is empowered to invest the purchase price in England or Wales.<sup>3</sup> The granting of power to heirs of entail to make liferent provisions to their widows and children out of the rents by way of locality has been held not to be such a limitation of the prohibition against alienation as to make the entail invalid.<sup>4</sup> A sale of the life-interest of the heir in possession, if duly guarded so as not to affect subsequent heirs, is not an alienation;<sup>5</sup> nor is a propulsion of the estate to the next heir entitled to succeed,<sup>6</sup> and the propelling deed does not need to enter the Register of Tailzies;<sup>7</sup> nor is the assignation of a bond, containing a power of sale, to which the heir had become entitled, in favour of third parties.<sup>8</sup> The granting of feus is an alienation.<sup>9</sup> A prohibition to alienate also interfered with the granting of leases for a longer period than that necessary for agricultural purposes.<sup>10</sup> It does not prevent an heir cutting timber if ripe, provided his so doing does not interfere with the amenity of the mansion-house.<sup>11</sup> If the heir grant a building lease (under powers), he cannot even prevent his tenant cutting the timber on the plea of its being an alienation.<sup>12</sup>

### (iii) *The Prohibition to contract Debt.*

**461.** The provisions of the Entail Acts and, in particular, of s. 18 of the Entail (Scotland) Act, 1882, which empowers creditors in respect of debts incurred after 18th August 1882, who have obtained decree against the heir of entail in possession and have charged upon the decree, to apply to the Court to ordain the heir in possession to execute an instrument of disentail, thus permitting them to affect the disentailed estates with their debts, have to a great extent rendered this prohibition useless. But the prohibition is necessary to constitute a strict entail.

<sup>1</sup> *Earl of Eglinton v. Lord Montgomerie*, 1845, 7 D. 425.

<sup>2</sup> *Baird v. Baird*, 1844, 6 D. 643; 6 Bell's App. 7.

<sup>3</sup> *Verney v. Verney*, 1914 S.C. 801, at p. 817.

<sup>4</sup> *Rogerson v. Rogerson*, 1872, 10 M. 698.

<sup>5</sup> *Fairlie's Trs. v. Fairlie*, 1860, 22 D. 632.

<sup>6</sup> *Viscount Dupplin v. Hay*, 1871, 10 M. 89; *MacLeod v. M'Kenzie*, 1827, 6 S. 77; *Lord Advocate v. Earl of Buchan*, 1907 S.C. 849; 1909 S.C. (H.L.) 8.

<sup>7</sup> *Turnbull v. Newton*, 1836, 14 S. 1031; *Earl of Buchan, supra*, at p. 864; *Earl of Eglinton v. Montgomerie*, 1842, 4 D. 425; 2 Bell's App. 149.

<sup>8</sup> *M'Donald v. M'Donald*, 1877, 4 R. 280.

<sup>9</sup> *Cathcart v. Shaw*, 1756, 1 Pat. 618; *Ker v. Duke of Roxburghe*, 1813, 5 Pat. 768.

<sup>10</sup> *Duke of Queensberry's Trs. v. Earl of Wemyss and March*, 1813, 5 Pat. 758; *Bontine v. Bontine*, 1864, 2 M. 918.

<sup>11</sup> *Hamilton v. Viscountess of Oxfurd*, 1757, Mor. 15408; *Bontine v. Carrick*, 1827, 5 S. 811; cf. *Huntley's Trs. v. Hallyburton's Trs.*, 1880, 8 R. 50; *Boyd v. Boyd*, 1870, 8 M. 637.

<sup>12</sup> *Lord Elibank v. Renton*, 1833, 11 S. 238.

It applies, not to the personal debts of the heir in possession, but to debts by which the estate might be burdened, adjudged, or in any way affected to the detriment of the subsequent heirs.<sup>1</sup> The prohibition must contain words equivalent to a prohibition against contracting debts which may affect the lands.<sup>2</sup> It does not prevent the heir borrowing on his life-interest,<sup>3</sup> and it has been held that a bond granted by an heir in possession over the entailed estate, subject to a declaration that it should not affect the lands in any way inconsistent with the deed of entail or so as to infringe on the rights of succeeding heirs, does not affect the fee of the lands, but only the heir's interest therein.<sup>4</sup> Even in an onerous entail the prohibition does not hinder the estate being attached for personal debts contracted prior to the completion or recording of the entail.<sup>5</sup> In questions between heirs of entail and creditors, the heirs are treated as creditors, and that party is preferred whose right is first completed by infestment or otherwise.<sup>6</sup> A limited provision for widows or younger children, so guarded that it cannot be made the means of destroying the effect of the prohibitory clauses, does not invalidate the entail.<sup>7</sup>

(iv) *The Prohibition against altering the Order of Succession.*

**462.** "The prohibition against altering the order of succession strikes more particularly at direct innovations on the line of succession by *mortis causa* act, either in the form of addition or suppression, or by imposing new restrictions."<sup>8</sup> This prohibition sometimes appears combined with that against alienation. To be effectual, it must be possible to extract from the combined clause a clear prohibition against altering the order of succession, and not merely a prohibition against defeating the next heir's chance of succeeding. This was held to be effectually done in two cases cited below,<sup>9</sup> and the reverse in the cases undernoted.<sup>10</sup> To add to the destination is equivalent to alteration.<sup>11</sup>

SUBSECTION (3).—*The Irritant and Resolutive Clauses.*

**463.** These are the clauses which, in terms of the statute 1685, are necessary to make the entail effectual against third parties—the first

<sup>1</sup> *Mackenzie v. Mackenzie*, 1823, 2 S. 331; *Denham v. Denham*, 1737, 5 Bro. Supp. 200; *Douglas & Co. v. Glassford*, 1825, 1 W. & S. 323.

<sup>2</sup> *Seton v. Seton*, 1854, 16 D. 658; *Martin v. Dunbar*, 1844, 6 D. 1320; *Cathcart v. MacLaine*, 1846, 8 D. 970; *Cathcart v. Cathcart*, 1863, 1 M. 759; *Arbuthnott v. Arbuthnott*, 1865, 3 M. 835; *Lindsay v. Earl of Aboyne*, 1842, 4 D. 843; 1844, 3 Bell's App. 254.

<sup>3</sup> *Bontine v. Graham*, 1837, 15 S. 711; *Nairne v. Gray*, 15th February 1810, F.C.

<sup>4</sup> *Somervell's Tr. v. Somervell*, 1904, 6 F. 926.

<sup>5</sup> *Smollet's Crs. v. Smollet*, 1807, Mor. App. "Tailzie," No. 12; *Munro v. Drummond*, 1831, 5 W. & S. 359; cf. *Agnew v. Stewart*, 1822, 1 Sh. App. 320; and see Entailer's Debts, para. 471, *infra*.

<sup>6</sup> *Agnew v. Stewart*, *supra*.

<sup>7</sup> *Catton v. Mackenzie*, 1872, 10 M. (H.L.) 12.

<sup>8</sup> Rankine, Land-Ownership, 4th ed., p. 695, and cases there cited.

<sup>9</sup> *Ker v. Innes*, 1811, 5 Pat. 361; *Monypenny v. Campbell*, 1839, Macl. & R. 898.

<sup>10</sup> *Elphinstone v. Burnett*, 1850, 12 D. 848; *Lang v. Lang*, 1839, Macl. & R. 871; cf. *Wallace v. Wallace's Trs.*, 1880, 7 R. 902.

<sup>11</sup> *Menzies v. Menzies*, 1785, Mor. 15436.

irritating or annulling all deeds granted in contravention of the prohibitions, and the latter resolving or forfeiting the right of the heir who contravenes. As in the case of the prohibitive clauses, a clause of registration is now equivalent to the insertion of the irritant and resolute clauses. The deeds to be annulled must be those affecting the estate, and the clauses must not be confined in their application to deeds granted or debts contracted, whereby the lands and estate may be burdened or evicted from the heirs of entail;<sup>1</sup> and if either the institute or any one of the heirs is not comprehended in these clauses, he is not affected by them.<sup>2</sup> The same strict rules of construction are applied to these clauses as to the prohibitions, and hence erasures or omissions are fatal, and cannot be supplied by implication.<sup>3</sup> Effectually to fetter the heir in possession, it is essential that these clauses should refer to all the prohibitions; but to make the entail valid against third parties, it is only necessary that they should cover the three cardinal prohibitions.<sup>4</sup> This may be done by a general reference in the irritant and resolute clauses to the prohibitions, or by enumeration of the individual prohibitions in detail. As the irritant and resolute clauses in the deed of entail usually follow directly after the prohibitory clauses, and are sometimes coupled to them by some such words as "all which," it has been a frequent matter of construction whether the reference contained in the irritant and resolute clauses clearly refers to all the prohibitions, or merely to the prohibitions immediately preceding the irritant clause. In some entails where such coupling words have been used, the reference in the fettering clauses has been held to include all the prohibitions,<sup>5</sup> and in others only to include some of the prohibitions.<sup>6</sup> In the case of *Wallace* the Court were influenced, in distinguishing the judgment of the House of Lords in *Lang*, by the consideration that since that decision, the Legislature, in relaxing the old law as to entails, had pointed to the advisability of a benignant and favourable construction of clauses such as those here under consideration, rather than the more strict interpretation adopted before the Entail Acts came into force. *Lang's* case was criticised later by the House of Lords in *Ogilvy's* case.<sup>7</sup> Where the irritant and resolute clauses stand alone, and words of reference are used, these words must, on a strict construction, be capable of including all the prohibitions. Words which, standing by themselves,

<sup>1</sup> *Gibson v. Gibson*, 1869, 7 M. 791.

<sup>2</sup> *Elibank v. Campbell*, 1835, 1 S. & M'L. 1; *Morehead v. Morehead*, 1835, 1 S. & M'L. 29; see also *Wauchope v. Wauchopes*, 1884, 11 R. 424.

<sup>3</sup> *Sharpe v. Sharpe*, 1832, 10 S. 747; revd. 1835, 1 S. & M'L. 594.

<sup>4</sup> *Anstruther v. Anstruther*, 1840, 3 D. 142; *Cathcart v. Cathcart*, 1831, 5 W. & S. 315; *Cochrane v. Bogle*, 1849, 11 D. 908, per Lord Ivory at p. 922.

<sup>5</sup> *Hay v. Hay*, 1842, 5 D. 347; *Malcolm v. Kirk*, 1873, 11 M. 722; *Wallace v. Wallace's Trs.*, 1880, 7 R. 902; *Ogilvy v. Earl of Airlie*, 1855, 2 Macq. 260.

<sup>6</sup> *Lang v. Lang*, 1839, MacL. & R. 871; *Sinclair v. Sinclair*, 1841, 3 D. 636; *Baillie v. Baillie*, 1850, 12 D. 1220.

<sup>7</sup> *Ogilvy v. Earl of Airlie*, *supra*.



have in some entails been held to do so,<sup>1</sup> have in other entails been held, from the context, merely to refer to individual prohibitions.<sup>2</sup>

**464.** Where the clauses are formed on the principle of enumeration, they usually contain general words, in addition to special words, of enumeration of the prohibitions. If the enumeration of the prohibitions is complete, then the general words are superfluous, and the clause is good.<sup>3</sup> If the enumeration is incomplete and the general words are words of reference capable of including all the prohibitions, still the clause is good.<sup>4</sup> But if the enumeration is not complete, and the general words are not words of reference, then the clause fails, on the principle of defective enumeration;<sup>5</sup> and the general words, if they precede the words of enumeration of the prohibitions, are confined to the prohibitions enumerated; and if they follow, the words of the enumeration are confined to the prohibitions *ejusdem generis*.<sup>6</sup> The decisions on this topic are very numerous, and the judgments in many cases are hard to reconcile. The undernoted authorities have been selected as instances in which the enumeration has been held not to embrace all the cardinal prohibitions.<sup>7</sup> Where the clauses are framed on the principle of enumeration, but are not applicable to one of the prohibitions, the entail is, under s. 43 of the Rutherfurd Act, defective in regard to all the prohibitions and invalid even in questions *inter hæredes*.<sup>8</sup>

#### SECTION 6.—RESERVED POWERS CONTAINED IN A DEED OF ENTAIL.

**465.** Apart from the statutory powers which an heir of entail now enjoys under the Entail Acts, there are certain relaxations of the cardinal prohibitions which can competently be introduced into a deed of entail, and which are termed the reserved powers. If the power were absolutely contradictory of one of the cardinal prohibitions, the entail would be bad; but even where it is apparently wide enough to render the prohibition inoperative, the rule of construction to be applied to the reserved power is that it is subservient to, and not intended to defeat, the prohibition,<sup>9</sup> and the power can only be exercised to such a limited extent

<sup>1</sup> *Lumsden v. Lumsden*, 1840, 3 D. 136; 1843, 2 Bell's App. 104; *Laurie v. Laurie*, 1854, 17 D. 181; *Gilmour v. Gordon*, 1853, 15 D. 587; *Howden v. Rocheid*, 1869, 7 M. (H.L.) 111.

<sup>2</sup> *Lord Wharnccliffe v. Nairne*, 1849, 12 D. 1; 1850, 7 Bell's App. 132; *Hay v. Hay*, 1851, 13 D. 945; *Udny v. Udny*, 1858, 20 D. 796; *Lang v. Lang*, 1839, MacL. & R. 871.

<sup>3</sup> *Renton v. Munro*, 1843, 5 D. 1419; *Ogilvy v. Ogilvy*, 1874, 1 R. 450; *Speirs v. Speirs' Trs.*, 1878, 5 R. 923; *Ogilvy v. Earl of Airlie*, 1855, 2 Macq. 261.

<sup>4</sup> *Earl of Kintore v. Lord Inverury*, 1861, 23 D. 1105; 1863, 4 Macq. 520; *Wauchope v. Wauchopes*, 1884, 11 R. 424.

<sup>5</sup> *Rennie v. Horne*, 1838, 3 S. & M'L. 142.

<sup>6</sup> Per Lord Westbury in *Earl of Kintore*, *supra*.

<sup>7</sup> *Thomson v. Milne*, 1839, 1 D. 592; *Bruce v. Bruce*, 1801, 4 Pat. 231; *Baillie v. Baillie*, 1850, 12 D. 1220; *Lord Duffus' Trs. v. Dunbar*, 1842, 4 D. 523; *Martin v. Dunbar*, 1844, 6 D. 1320; *Scott v. Scott*, 1855, 18 D. 168; *Lord Rollo v. Rollo*, 1864, 3 M. 78.

<sup>8</sup> *Lord Hamilton v. Duke of Hamilton*, 1870, 8 M. (H.L.) 48.

<sup>9</sup> *Baird v. Baird*, 1844, 6 D. 643, per Lord Justice-Clerk Hope at p. 650; 6 Bell's App. 7.

as is consistent with the subsistence of the entail over the greater body of the estate.<sup>1</sup> With reference to all such reserved powers, the rule is clear that, to the extent to which the estate may be alienated or burdened, it is unentailed and may be attached by creditors.

**466.** Such reserved powers are: (1) power to sell to pay the entailor's debts;<sup>2</sup> (2) power to sell or to excamb the estate, and to reinvest in land to be entailed on the same heirs;<sup>3</sup> (3) power to grant feus. Apart from the provisions of the Entail Acts this last power is obviously struck at by the prohibition against alienation in the Statute of 1685. But, towards the end of the eighteenth and the beginning of the nineteenth centuries, the advisability, in the interests of growing communities, of allowing some relaxation to the prohibitive clauses, resulted in two litigations, both of which were carried to the House of Lords, and which established the competency of reserving power to grant feus in a deed of entail, which, however, must not be unduly exercised, but with a view to the rational and fit management of the estate;<sup>4</sup> (4) power to grant provisions to the surviving spouse and to the younger children. The provision must be strictly limited to the amount allowed,<sup>5</sup> and it usually excludes terce and courtesy.<sup>6</sup> If the provision be in the form of a bond of annuity restricted by the rental, then the amount of the rental is struck as at the entailor's death.<sup>7</sup> In determining the rental, there is no distinction between cases arising under a reserved power and those under a statutory power;<sup>8</sup> but in calculating the "free rent," the deductions allowed must depend on the special provision of the deed, and no analogy can be drawn from the special provisions of the Aberdeen Act.<sup>9</sup> "Younger children" are the issue surviving the appointer,<sup>10</sup> other than the heir succeeding to the estate;<sup>11</sup> but if none of the appointer's issue are called in the destination of the entail, there can be no "younger children" in whose favour he can make an appointment.<sup>11</sup> A provision in the marriage contract of a child, who at the date of the marriage contract is not entitled to succeed, made in the exercise of a power under a deed of entail, is indefeasible even if the child predecease his father.<sup>12</sup> A power to provide for the issue of the "eldest son" has been construed to mean the issue of the next heir not excluded from the estate,<sup>13</sup> and a provision to "daughters and heirs female" of the entailor was held to be valid as regards the daughter,

<sup>1</sup> *Baird*, *supra*, per Lord Moncrieff at p. 655.

<sup>2</sup> *Lord Kilburny v. Schaw*, 1669, Mor. 15347; *Scot v. His Heirs of Tailzie*, 1751, Mor. 15394.

<sup>3</sup> *Baird*, *supra*.

<sup>4</sup> *Innes v. Kerr*, 1808, Mor. App. "Tailzie," Nos. 13 and 18; 1812, 2 Dow 149; 5 Pat. 609, 768; *Cathcart v. Schaw*, 1755, Mor. 15399; 1 Pat. 618. For an appreciation of these decisions see Rankine on Land-Ownership, 4th ed., pp. 702-704.

<sup>5</sup> *Makgill v. Law*, 1798, Mor. 15451.

<sup>6</sup> *Gibson v. Reid*, 1795, Mor. 15869.

<sup>7</sup> *Douglas v. Douglas*, 1822, 1 S. 408 (N.E. 382).

<sup>8</sup> See paras. 509 *et seq.*, *infra*.

<sup>9</sup> *Balfour-Melville v. Mylne*, 1901, 3 F. 421; see Rankine on Land-Ownership, 4th ed., p. 712.

<sup>10</sup> *Catton v. Mackenzie*, 1870, 8 M. 1049; 1872, 10 M. (H.L.) 12, per L.C. at p. 21.

<sup>11</sup> *Dickson v. Dickson*, 1851, 13 D. 1291; 1852, 14 D. 432; 1854, 1 Macq. 729.

<sup>12</sup> *Oswald v. Oswald*, 1821, 1 S. 225; *Chancellor's Trs. v. Sharples' Trs.*, 1896, 23 R. 435.

<sup>13</sup> *Erskine*, 1850, 12 D. 649.

although she was not truly the "heir female," the entailor having a son and the estate being entailed upon heirs male.<sup>1</sup> Where a child predeceases his parent, the power may now be exercised in favour of the predeceasing child's issue in terms of s. 10 of the Entail Amendment (Scotland) Act, 1875;<sup>2</sup> but the heir in possession does not validly exercise the power by granting a bond in favour of trustees, with directions to pay the interest to his children and to invest the capital in the purchase of lands to be entailed upon his children and their heirs, save only in so far as the grant of interest is concerned, the provision being intended to be for the benefit exclusively of the younger children and not of more remote relatives.<sup>3</sup> In exercising the power, the heir may attach conditions to the bond of provision granted by him.<sup>4</sup> Provisions unpaid by any heir are exigible from the succeeding heir, and the entailed estate is liable both for capital and interest.<sup>5</sup> It is not a fair exercise of a power to grant provisions contingent on the event of the granter losing his right to the estate in terms of a clause of devolution.<sup>6</sup> (5) Power to nominate heirs. In the deed of entail the entailor may reserve power to himself to nominate heirs other than or in addition to those prescribed in the deed itself, or may even confer power upon succeeding heirs to innovate on the prescribed line to a limited extent.<sup>7</sup>

#### SECTION 7.—EXPRESS CONDITIONS CONTAINED IN A DEED OF ENTAIL.

**467.** In addition to the three cardinal prohibitions, an entailor may insert any conditions he pleases in the deed of entail; and if these are properly fenced, they will be enforced in the same way as the cardinal prohibitions. Such are: (1) Conditions to use the name and arms of the entailor. If an entailor's coat of arms does not exist, one must be got,<sup>8</sup> and a coat granted by the Lyon King-at-Arms cannot be challenged in a declarator of contravention;<sup>9</sup> a name, if assumed, need not be the last in order;<sup>10</sup> (2) a condition that the heirs must comply with the regulations of the Statute of 1685, which is superfluous, as the statutory regulations can be enforced by any heir; (3) a condition to pay the entailor's debts, which is generally accompanied by a power to burden for that purpose;<sup>11</sup> and (4) a clause of devolution, which is commonly to the effect that the heir in possession, on succeeding to some other estate, or to a title, is to surrender his right to the

<sup>1</sup> *Watson v. Glass*, 1743, Mor. 2306; 1744, 1 Pat. 372.

<sup>2</sup> 38 & 39 Vict. c. 61.

<sup>3</sup> *Viscountess Strathallan v. Duke of Northumberland*, 1840, 2 D. 840; 5 Bell's App. 396.

<sup>4</sup> *Howden v. Porterfield*, 1834, 125, 734; 1835, 1 S. & M'L. 739; *Campbell v. Campbell*, 1860, 23 D. 159.

<sup>5</sup> *Duchess of Richmond v. Duke of Richmond's Trs.*, 1837, 16 S. 172; and see *Liability of Estate for Entailor's Debts*, para. 471, *infra*.

<sup>6</sup> *Cassilis v. Hamilton*, Elch. "Provisions to Heirs," No. 6; *sub nom. Earl of Selkirk v. Hamilton*, 1745, 1 Pat. 381.

<sup>7</sup> See Rankine on Land-Ownership, 4th ed., p. 713, and cases there cited.

<sup>8</sup> *Moir v. Graham*, 1794, Mor. 15537.

<sup>9</sup> *Hunter v. Weston*, 1882, 9 R. 492.

<sup>10</sup> *Hunter*, *supra*; see also *Munro v. Munro*, 1826, 4 S. 467; 1828, 3 W. & S. 344.

<sup>11</sup> See *Reserved Powers*, para. 466, *supra*, and *Entailor's Debts*, para. 471, *infra*.



entailed estate. The devolution is held to be a condition of the original grant, and on the contingency occurring, the right of the next heir to the entailed estate takes immediate effect, without being constituted by declarator, and may be enforced by an action of adjudication, the decree in which will give him right to the rents from the date of the occurrence of the contingency.<sup>1</sup> "Succession" to another estate does not include acquisition of that estate under a parliamentary contract.<sup>2</sup> Where the succession to an entailed estate opens to an heir of entail after the contingency contemplated in the clause of devolution has already affected him, he will be effectually excluded from the succession to the entailed estate.<sup>3</sup> The heir of entail may elect between the two estates where the devolution is contingent on succession;<sup>4</sup> but he may not deprive his descendants of the succession in the event of their being entitled to come in under the same or a subsequent destination.<sup>5</sup> An heir of entail in possession who is the nearest heir under the entail, but who holds subject to the possibility of having to denude in the event of certain contingencies, is regarded as an ordinary heir of entail with all the powers of a proprietor until the occurrence of the event, except so far as expressly restrained by the deed of entail;<sup>6</sup> but in the case of an heir in possession who holds subject to the possible emergence of a nearer heir, the former possesses only in a fiduciary capacity and with a duty to preserve the estate for the nearer heir.<sup>7</sup> For the construction of special clauses of devolution, see the cases undernoted.<sup>8</sup> An heir in possession whose right may be devolved has all the rights of an heir-substitute until the occurrence of the contingency.<sup>9</sup> He can grant provisions under the Aberdeen Act for wife and children which will be valid even if he have to denude;<sup>10</sup> and where succession to a peerage would devolve the estate from the heir in possession and his "heir-apparent"—a term introduced into Scottish legal phraseology by the Rutherford Act—it was held that, in view of the provisions of that Act, he could disentail with the consent of his eldest son.<sup>11</sup>

<sup>1</sup> *Viscountess Hawarden v. Elphinstone's Tr.*, 1866, 4 M. 353; and see also *Stewart v. Nicolson*, 1859, 22 D. 72.

<sup>2</sup> *Marquis of Hastings v. Lady Hastings*, 1844, 7 D. 1; 1847, 6 Bell's App. 30.

<sup>3</sup> *Lockhart v. Gilmour*, 1755, Mor. 15404; 1756, 1 Pat. 610; *Fleming v. Lord Elphinstone*, 1804, Mor. 15559; *Henderson v. Henderson*, 1790, Mor. 4215; 1791, 3 Pat. 686.

<sup>4</sup> *Stirling v. Stirling*, 1834, 12 S. 296.

<sup>5</sup> *Marquis of Bute v. Stuart Wortley*, 1803, 4 Pat. 450; *Fullarton v. Hamilton*, 1825, 1 W. & S. 410.

<sup>6</sup> *Earl of Eglinton v. Hamilton*, 1847, 9 D. 1167; 6 Bell's App. 136.

<sup>7</sup> *Stewart v. Nicolson*, *supra*; but see as to the effect of the Entail Acts, Rankine, Land-Ownership, 4th ed., p. 690.

<sup>8</sup> *Leslie v. Leslie*, 1742, 1 Pat. 324; *Hay v. Marquis of Tweeddale*, 1771, Mor. 15425; 1773, 2 Pat. 322; *Campbell v. Campbell*, 1868, 6 M. 1035; *Stewart v. Nicolson*, *supra*; *Munro v. Butler Johnstone*, 1868, 7 M. 250; *Nicolson v. Arbuthnott*, 1878, 5 R. 872.

<sup>9</sup> *Earl of Eglinton v. Hamilton*, *supra*.

<sup>10</sup> *Earl of Kinnoull's Trs. v. Drummond*, 1869, 7 M. 576; *Hunter Blair v. Hunter Blair*, 1899, 1 F. 437.

<sup>11</sup> *Forbes v. Burness*, 1888, 15 R. 797; see also Power to Disentail, para. 473, *infra*.

## SECTION 8.—COMPLETION OF DEED OF ENTAIL.

**468.** A deed of entail is not necessarily intrinsically null because of a discrepancy between its narrative and dispositive clauses, and when prescription has run upon it the dispositive clause will prevail.<sup>1</sup> The entail, to be effectual against third parties, is completed by the publication of its terms; and this, according to the Act of 1685, was effected by recording the deed itself, with the authority of the Court, in the Register of Tailzies, and by repeating *ad longum* the prohibitory, irritant, and resolute clauses in all the instruments of the investiture and in the procuratories of resignation, the precept of sasine of the deed, and all the subsequent deeds of transmission. It is now sufficient, in any deed of conveyance, to refer to these clauses, or to the clause of registration which may now take their place, as set forth in the deed of entail itself. An instrument of sasine, too, is no longer necessary, and it is sufficient to record the deed itself in the Register of Sasines.<sup>2</sup> Warrant to record an entail is obtained by petition to the Junior Lord Ordinary;<sup>3</sup> but this is not the proper stage at which to discuss the validity of the entail.<sup>4</sup> The petition may be presented by the maker, his trustees, the institute or any heir-substitute, but probably not by an heir whomsoever;<sup>5</sup> and any heir-substitute is entitled to compel the heir of entail to record the deed.<sup>6</sup> The deed of tailzie must be produced, and diligence will be granted for its recovery, even though the heir of entail who makes the application has not proved his propinquity;<sup>7</sup> where it has been lost, the decree in the proving of its tenor may be recorded.<sup>8</sup> An inaccuracy in the petition does not cancel the validity of the authority given to record, if the proper deed of entail has been produced.<sup>9</sup> The proper deed to record is that which actually settles the estates, even though it does not contain executorial clauses making it capable of feudalisation.<sup>10</sup> The names of the heirs of tailzie must be recorded; but if contained in a separate deed of nomination, this may be done subsequently to recording the deed of tailzie.<sup>11</sup> Deeds executed under a reserved power must also be recorded,<sup>12</sup> and the full description of the lands entailed must enter the record.<sup>13</sup> When an heir of entail has obtained power to sell parts of the entailed estates and to apply the proceeds in the purchase of other lands to be thrown

<sup>1</sup> *Cooper Scott v. Gill Scott*, 1924 S.C. 309.

<sup>2</sup> Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101, s. 9).

<sup>3</sup> See Juridical Styles, vol. iii., p. 477. For procedure, see Maclaren, Bill Chamber Practice, pp. 145–147.

<sup>4</sup> *Gilmour's Trs. v. Gilmour*, 1856, 19 D. 134.

<sup>5</sup> *Jessop*, 1822, 1 S. 294 (N.E. 273).

<sup>6</sup> *Lord Napier v. Livingstone*, 1765, 2 Pat. 108; *Nairne v. Nairne*, 1757, Mor. 15605.

<sup>7</sup> *Ker*, 1804, Mor. 14984; cf. *Spittal*, 1781, Mor. 15617.

<sup>8</sup> See Shand's Practice, 1019.

<sup>9</sup> *Norton v. Stirling*, 1852, 14 D. 944; 1855, 2 Macq. 205.

<sup>10</sup> *Lord Forbes v. Gammell*, 1858, 20 D. 917; *Earl of Fife v. Duff*, 1862, 4 Macq. 469.

<sup>11</sup> *Padwick v. Stewart*, 1874, 1 R. 697, at p. 720.

<sup>12</sup> *Inglis v. Inglis*, 1851, 14 D. 54.

<sup>13</sup> *King v. Earl of Stair*, 1844, 6 D. 821; 1846, 5 Bell's App. 82.

into the entail, it is necessary to register the disposition of the lands acquired in the Register of Tailzies.<sup>1</sup>

**469.** An unrecorded deed of entail has no protection from the Act of 1685; and although it is binding on the heirs themselves, in so far as to protect the estate against their gratuitous deeds, it has no effect against the onerous creditors of the heir in possession.<sup>2</sup> It is equivalent to a non-existent deed of entail in reference to such creditors; and their rights cannot be defeated by any subsequent registration of the entail, or by any proceedings founded on the entail, to whatever lengths these proceedings may have gone.<sup>3</sup> They could even adjudge the estate after the heir who had contracted the debt had forfeited the estate by a contravention.<sup>4</sup> The heir under an entail, not recorded in the Register of Tailzies, can sell the estate;<sup>5</sup> and he is not bound to reinvest the price.<sup>6</sup>

#### SECTION 9.—PERSONS AFFECTED BY THE FETTERS.

**470.** In questions with third parties all the heirs-substitute are bound by the limitations of the entail, but doubts sometimes arise as to whether the limitations are properly made to affect (1) the institute; (2) whom failing before the succession opens, the first of the heirs who takes the estate; and (3) the maker of the entail where he is himself the institute. The institute is the party named in the deed as the first beneficial taker of the fee.<sup>7</sup> He may be subjected to the restraints of an entail,<sup>8</sup> although there is no express authority for this in the Act of 1685. But the Court will not readily hold that the institute is bound by the fetters, for "this unquestionably is law, that the clause imposing fetters must be construed strictly, and that the Court must find in that clause express terms including the institute."<sup>9</sup> The institute is, generally speaking, to be considered as a special disponee and not as an heir of entail, and he is not, accordingly, included among the "heirs" or "members" of tailzie even by implication from other parts of the deed.<sup>10</sup> If he is expressly comprehended in the prohibitory clauses, he may be included in a general term in the irritant and resolute clauses.<sup>11</sup> If, owing to the failure of the institute named in the deed, the succession opens to the next heir, he is included under the "heirs of tailzie," and the above rules do not apply to him.<sup>12</sup> If the institute is himself the maker of the entail, it is, of course, essential that the fetters be applied to him,<sup>13</sup> but

<sup>1</sup> *Anstruther Thomson* (O.H.), 1924, S.L.T. 116.

<sup>2</sup> *Willison v. Callender*, 1724, Mor. 15369.

<sup>3</sup> *Ross v. Drummond*, 1836, 14 S. 453; *Rose v. Drummond*, 1828, 6 S. 945; 1831, 5 W. & S. 359. <sup>4</sup> *Ross*, *supra*. <sup>5</sup> *Grahame v. Grahame*, 1829, 8 S. 231.

<sup>6</sup> *Montgomerie v. Earl of Eglinton*, 1843, 2 Bell's App. 149.

<sup>7</sup> *Maxwell v. Logan*, 1836, 15 S. 291; 1839, MacL. & R. 790.

<sup>8</sup> *Willison v. Willison*, 1726, Mor. 15458. <sup>9</sup> *Maxwell v. Logan*, *supra*, per L.C. at p. 803.

<sup>10</sup> *Edmonstone v. Edmonstone*, 1771, 2 Pat. 255; *Steel v. Steel*, 1817, 6 Pat. 322; *Lord Elbank v. Murray*, 1833, 11 S. 858; *Glendonwyn v. Gordon*, 1873, 11 M. (H.L.) 33.

<sup>11</sup> *Lindsay v. Earl of Aboyne*, 1844, 3 Bell's App. 254, at p. 292; *Buchanan v. Carrick*, 1838, 16 S. 358; 1844, 3 Bell's App. 342.

<sup>12</sup> *Napier v. Livingstone*, 1765, 2 Pat. 108.

<sup>13</sup> *Duke of Hamilton v. Douglas*, 1762, Mor. 4358, at p. 4375.



since it is a fundamental rule of law that no one can retain the fee of an estate and at the same time remove it from the reach of his creditors, so the maker of an entail cannot gratuitously include himself within the prohibitions so as to prejudice his creditors;<sup>1</sup> but by an onerous and mutual tailzie he may so include himself.<sup>2</sup>

SECTION 10.—LIABILITY OF ESTATE FOR ENTAILER'S DEBTS, AND THEIR EXTINCTION BY THE HEIR IN POSSESSION.

**471.** An entailed estate is generally liable for all the debts of the entailor, unless he himself is the institute in the deed of entail, and is expressly included in the fetters so as to exclude legal diligence for payment of debts contracted by him after the date of the deed of entail. Payment of entailor's debts is also often inserted in the deed of entail as a condition under which the heirs may take the succession. In this latter case they only affect the entailed estate if this is clearly the intention of the entailor.<sup>3</sup> Unless the entailor's debts have been made real burdens primarily affecting the estate, the heir of entail, notwithstanding a clause in the deed of entail to the effect that "I hereby expressly burden this right and disposition . . . with payment of all the just and lawful debts that shall be resting by me at the time of my death, to whatever person or persons, by bond, bill, contract, decree, or any other manner of way," has been held entitled to the benefit of discussion, and to insist on the executry of the entailor and his unentailed heritage being first exhausted;<sup>4</sup> but the estate is also liable, and may be adjudged or sold to pay them.<sup>5</sup> Bonds of provision granted under a power in the deed of entail are in the same position as entailors' debts, and the entailed estate is liable not only for the principal sum but for arrears of interest.<sup>6</sup> The heir in possession may leave the debts as a burden on the estate in the hands of the succeeding heirs, who are bound to pay the interest thereon during their own lives, but not interest upon interest which has accumulated;<sup>7</sup> and it is to prevent this that the condition obliging the first heir in possession to pay is so frequently included in the deed of entail.

**472.** Where the entailor leaves two estates under different entails, his debts are allocated rateably.<sup>8</sup> Where the heir in possession becomes

<sup>1</sup> *Dickson v. Cunninghame and Medwyn*, 1786, Mor. 15534; affd. 1831, 5 W. & S. 657; for opinion of Judges of Court of Session see p. 662.

<sup>2</sup> *Dickson*, *supra*, per L.C. at p. 696; *Vans Agnew v. Stewart*, 1822, 1 Sh. App. 320.

<sup>3</sup> *Campbells v. Campbell*, 1747, Mor. 5213; *Moncrieff v. Skene*, 1825, 1 W. & S. 672; *Elliot v. Earl of Minto*, 1823, 2 S. 180; 1825, 1 W. & S. 678; *Jardine v. Lockhart*, 1833, 11 S. 720.

<sup>4</sup> *Russel v. Russel*, 1745, Mor. 5211.

<sup>5</sup> *Earl of Lauderdale v. Heirs of Entail*, 1730, Mor. 15556.

<sup>6</sup> *Howden v. Porterfield*, 1834, 12 S. 734; *Duchess Dowager of Richmond v. Duke of Richmond*, 1837, 16 S. 172; *Erskine v. Erskine*, 1829, 7 S. 844; *Sands v. Brisbane*, 1835, 13 S. 1040; but see 11 & 12 Vict. c. 36, ss. 17, 18, 21, and 22, for a statutory exception in case of interest on bond.

<sup>7</sup> *Campbell v. Campbell*, Nov. 29, 1815, F.C.; *Duchess of Richmond*, *supra*.

<sup>8</sup> *Lawrie v. Donald*, 1830, 9 S. 147.

also creditor in debts affecting the entailed estate, this will not necessarily operate extinction *confusione* of the debts as claims against the entailed estate, unless there is identity of destination;<sup>1</sup> but they will be held to be so extinguished where the heir of entail is liable for and pays the debts in some general character, *e.g.* as executor or heir-at-law,<sup>2</sup> unless they have been declared to be primarily chargeable on the entailed estate<sup>3</sup>—with this exception, that it is presumed, in the absence of evidence to the contrary, that an heir of entail paying such debts out of his own funds intended that they should be kept up against the estate.<sup>4</sup> Taking an assignation to the debts shows an intention that they are intended to be kept up against the estate;<sup>5</sup> but if the heir merely take a discharge, the presumption is that he meant to extinguish the debt.<sup>6</sup> Such a transaction may be vitiated by fraud or breach of statutory requirements.<sup>7</sup>

## SECTION 11.—STATUTORY POWERS OF AN HEIR OF ENTAIL.

### SUBSECTION (1).—*Power to Disentail.*

**473.** This power was first introduced by the Rutherfurd Act, 1848,<sup>8</sup> and the conditions under which an heir in possession was entitled under that Act to acquire the estate in fee-simple varied according as the entail was dated before or after the 1st of August 1848; hence the distinction between “old” and “new” entails. By the third section of the Act of 1882 the same powers of disentailing were extended to heirs possessing under a new entail which were by the third section of the Rutherfurd Act conferred on heirs possessing under an old entail, and the date of the entail is thus no longer so all-important as it was prior to the passing of the former Act. If in construing the Entail Acts the date of an “old” entail be taken as 1st August 1848 and the date of a “new” entail as its actual date, it will be found, subject to the proviso that an heir of entail born on 1st August 1848 is to be taken as having been born after an entail of the same date, that an heir of entail in possession, who is of full age (but not minors with consent of their curators nor the tutors of pupils (1882, s. 11)), may now disentail—

(1) Without any consents where he is the only heir of entail in existence for the time (1848, s. 3; 1875, s. 5 (3); 1882, s. 3).

(2) Without any consents where he is born after the date of the entail (1848, ss. 1 and 2).

<sup>1</sup> Ersk. iii. 4, 27; *Colvile's Trs. v. Marindin*, 1908 S.C. 911.

<sup>2</sup> *Forbes v. Lord Duncan*, Nov. 17, 1802, F.C.

<sup>3</sup> *M'Laren, Wills and Succession*, 3rd ed., s. 997.

<sup>4</sup> *Caddell v. Caddell's Trs.*, 1845, 7 D. 1014; *Ker v. Turnbull*, 1758, Mor. 15551; *Crawford v. Hotchkis*, Mar. 11, 1809, F.C.; *Welsh v. Barstow*, 1837, 15 S. 537.

<sup>5</sup> *M'Donald v. M'Donald*, 1877, 4 R. 280, per Lord Justice-Clerk Moncreiff at p. 286; *Ker, supra*; *Caddell, supra*.

<sup>6</sup> *Wauchope v. Duke of Roxburghe*, December 14, 1815, F.C.; 1825, 1 W. & S. 41.

<sup>7</sup> *Cleghorn v. Elliott*, 1840, 3 D. 1 (reported wrongly under date 12th November 1840); 1839, MacL. & R. 1033.

<sup>8</sup> 11 & 12 Vict. c. 36.

(3) With the consent of the heir-apparent where he is born before and the heir-apparent is born after the date of the entail (1848, ss. 1 and 2; 1882, s. 3).

(4) With the consents of the three nearest heirs, or of all the heirs if less than three, entitled to succeed in their order immediately after him as at the dates of their consents, and of presenting the petition (1848, s. 3; 1882, s. 3; 1853, s. 19).

(5) With the consents of the heir-apparent and of the heir who next in succession will become heir-apparent (1848, s. 3; 1882, s. 3), *i.e.* of the two heirs next in succession to the heir in possession whose right of succession, if they survive, must take effect.

**474.** Under the Rutherford Act it was a *sine qua non* in every case that the nearest heir must be twenty-five years of age and *capax* (ss. 1, 2, and 3). A curator or guardian might give the necessary consent for any heir other than the nearest who might be unable to consent owing to age or any other legal disability (s. 31). The Act of 1875 reduced the age at which the nearest heir might consent to twenty-one (s. 4), and provided that where any other heir than the nearest declined to give, or was legally incapable of giving, his consent, the Court might, on a motion to that effect by the petitioner, ascertain the value in money of such heir's expectancy, and, on the value being paid into bank, or sufficiently secured over the estate, dispense with the consent (s. 5 (2)). The Act of 1882 abolished any limitation whatever as to the age or legal capacity of the next heir, and allowed a curator or guardian to consent on his behalf also (s. 12); and further provided (s. 13) that his consent, if refused, might be dispensed with in the same manner as the consents of any other heirs of entail might be dispensed with in terms of the Act of 1875 (s. 5). But the conditions under which the Court is entitled to dispense with the consent of the next heirs are imperative and the procedure of the Acts must be strictly followed, and the disentailer cannot hasten matters by depositing a sum in excess of the amount claimed before the value of the expectancy of the next heir or heirs has been ascertained and paid into bank or secured.<sup>1</sup> When, however, an heir of entail disentailed certain lands in 1896 with the consent of the heir-apparent and re-entailed them in the same year, inserting in the new deed of entail a clause to the effect that only such consents to the disentail of the lands as were required under the earlier deeds should be necessary under the new deed, the legality of such a clause was disputed in circumstances in which, but for the clause, the consent of the heir-apparent alone would not have been sufficient. It was held that the clause in question was valid and effectual.<sup>2</sup>

**475.** Where the heir in possession or the heir-apparent have secured, by obligation in a marriage contract dated before 18th August 1882, the descent of the entailed estate on the issue of the marriage, they may

<sup>1</sup> *Baird v. Baird*, 1891, 18 R. 1184.

<sup>2</sup> *Earl of Rosebery v. Primrose's Curator* (O.H.), 1926, S.L.T. 585.



neither disentail nor give consent to a disentail without the consent of the marriage-contract trustees until the marriage be dissolved or a child be born who, by himself or by his guardians, can consent (1848, s. 8; 1882, s. 17);<sup>1</sup> but there must be a clear obligation securing the descent of the estate on the issue.<sup>2</sup> The trustee on the sequestrated estate or any creditor of an heir in possession, who has charged on a decree for payment of debt contracted after 18th August 1882, can apply to the Court to have the estate disentailed, subject to certain restrictions (1882, s. 18).<sup>3</sup>

**476.** The date of an entail is the date at which any Act of Parliament, deed of trust, or any writing directing that the land should be entailed comes into operation, whatever be the actual date of the entail (1848, s. 28),<sup>4</sup> even if the deed direct that the land be bought and entailed at a later date.<sup>5</sup> This appears to follow from the decision in *Riddell*,<sup>6</sup> in which case the sole question raised was as to the construction of s. 3 and not s. 28 of the 1848 Act. The two sections were contrasted, and it was observed by Lord President Inglis that "that artificial date thus deliberately introduced in the 28th section is a very strong argument that no artificial date is contemplated where it is not expressly made." A very special case may be mentioned in which a wife and husband left two separate deeds. The wife's deed came into operation at her death in 1886. Her husband died in 1904 leaving a trust disposition and settlement in which he directed that his own lands should be held by his widow's trustees for the same ends, uses, and purposes, and with the same rights and privileges thereto, as his widow's lands and estates, and that in the same manner and to the same effect as if his own estate had formed part of his widow's estate. The determination of the date of the entail under the husband's deed was vital upon the question as to what consents the petitioner required to obtain before disentailling the lands. It was held that the date of the entail of the husband's lands was 1886.<sup>7</sup> A similar provision to s. 28 of the 1848 Act is to be found in s. 2 of the 1914 Act.<sup>8</sup> Where lands had been disentailled and re-entailled by a deed containing a clause to the effect that "without prejudice to the effect of the statutes passed since the dates of the several deeds of entail hereinbefore referred to, the provisions of which statutes shall be applicable hereto . . . I and my said son and

<sup>1</sup> *Scott Douglas*, 1883, 10 R. 952; *Lockhart*, 1909, 1 S.L.T. 36.

<sup>2</sup> *Pringle v. Pringle*, 1891, 18 R. 895.

<sup>3</sup> *Lord Napier and Ettrick's Tr. v. Napier*, 1901, 3 F. 579; *Somervell's Tr. v. Dawes*, 1903, 5 F. 1065; *Somervell's Tr.*, 1906, 13 S.L.T. 718; *Somervell's Tr. v. Somervell*, 1907 S.C. 528; 1909 S.C. 1125.

<sup>4</sup> *Buchanan v. Jameson*, 1883, 10 R. 809; *Earl of Mansfield v. Lord Scone's Tutor*, 1908 S.C. 459.

<sup>5</sup> *Black v. Auld*, 1873, 1 R. 133; *Fraser v. Lord Lovat*, 1852, 14 D. 916; *Baird v. Baird's Tutor*, 1922 S.C. 637; but see *Riddell v. Lord Polwarth*, 1876, 3 R. 879.

<sup>6</sup> 1874, 1 R. 462; see also *Morison v. Morison's Curator*, 1912 S.C. 1117.

<sup>7</sup> *Earl of Rothes (O.H.)*, 1928, S.L.T. 428; cf. *Murray v. Murray's Tutor (O.H.)*, 1915, 1 S.L.T. 34.

<sup>8</sup> See para. 513, *infra*, where the decisions on this section are referred to.

the other heirs of entail called to the succession under these presents shall have . . . the same rights, powers, and privileges as if these presents had been executed . . . at the respective dates when the fore-said deeds of entail . . . were executed," it was held that an heir of entail who, but for this clause, would have been bound to obtain the consent of the heir-apparent and the next heir, was entitled to disentail with the consent of the heir-apparent alone.<sup>1</sup>

477. The deed of disentail, in which the subjects may be described by a short statutory reference,<sup>2</sup> only removes the fetters, and does not evacuate the destination (1848, s. 32).<sup>3</sup>

478. When an estate is disentailed the security to be given for Aberdeen provisions by an heir in possession must be for the maximum amount chargeable,<sup>4</sup> and the amount is, as a general rule, to be computed from the rental at the date of the production of the deed of disentail.<sup>5</sup> For an exception to this general rule in the case of a bankruptcy sale, see the case undernoted.<sup>6</sup>

479. The value of an heir-substitute's expectancy is the value of his life-interest calculated on his chance of succession, and the value of the powers he might exercise if he were to succeed.<sup>7</sup> If the present value of the heir's expectancy falls to be ascertained, an opinion has been expressed that this should be done by discounting at a rate of interest which the sum would yield if invested upon first-class security, and not by taking the rate of return which the heir in possession is receiving upon the capital value of the estate.<sup>8</sup> Where the disentail is by a trustee in bankruptcy, the powers which the heir in possession might have exercised are taken into account in estimating the value of the heir-substitute's expectancies.<sup>9</sup> No interest accrues on the value until it is consigned or secured.<sup>10</sup> Any facts bearing on the probable length of life of the petitioner, ascertained by remit to a medical man or by proof, are relevant, and the chance of the heir-substitute succeeding as fee-simple proprietor may be considered.<sup>11</sup> The value of the part disentailed is calculated on the loss to the whole estate, not on the intrinsic value of the part disentailed;<sup>12</sup> and the full amount remaining unpaid of a sum charged as improvement expenditure, in the form of a terminable rent-charge, may be deducted from the value of the estate.<sup>10</sup> The succession duty an heir-substitute would have to pay in the event of succeeding to the estate is not a proper deduction from the value of his expectancy.<sup>10</sup>

<sup>1</sup> *Earl of Rosebery v. Primrose's Curator* (O.H.), 1926, S.L.T. 585.

<sup>2</sup> *Duke of Hamilton* (O.H.), 1906, 14 S.L.T. 41.

<sup>3</sup> *Gray v. Gray's Trs.*, 1878, 5 R. 820.

<sup>4</sup> *Earl of Glasgow*, 1886, 14 R. 59.

<sup>5</sup> *Earl of Glasgow*, *supra*; *Pringle v. Pringle*, 1892, 19 R. 926; *Sprot* (O.H.), 1882, 19 S.L.R. 738; *Stewart Mackenzie v. Lady St Helier* (O.H.), 1906, 14 S.L.T. 448; and see *paras. 506 et seq., infra*.

<sup>6</sup> *Somervell's Factor* (O.H.), 1905, 13 S.L.T. 441.

<sup>7</sup> *De Virte v. Wilson*, 1877, 5 R. 328.

<sup>8</sup> *Earl of Kintore* (O.H.), 1918 S.C. 883, per Lord Sands.

<sup>9</sup> *Somervell's Tr. v. Somervell*, 1909 S.C. 1125.

<sup>10</sup> *Pringle, supra*.

<sup>11</sup> *Bankes v. Anderson*, 1899, 1 F. 1194; *M'Donalds v. M'Donald*, 1880, 7 R. (H.L.) 41; and *Pringle, supra*.

<sup>12</sup> *Duke of Sutherland v. Marquess of Stafford*, 1892, 19 R. 504.

**480.** The security to be given to an heir for the value of his consent must be such as a prudent lender would accept, which failing, the money value must be lodged in bank.<sup>1</sup> It is provided by s. 3 of the 1914 Act that where the value of any heir's expectancy has been ascertained it shall not be necessary in future to consign or pay into bank the ascertained sum, provided that security for the sum is given over the estate postponed only to such securities as validly affect, and such debts or provisions as might be made validly to affect, the estate or rents thereof at the date of the application for disentail. The preferred securities must not be granted by the heir in possession affecting only his life-interest. If there be more than one heir entitled to succeed, it is provided that their securities shall rank *pari passu* (s. 3). No action will lie against a *curator ad litem* for failure to obtain proper security for the value of his ward's consent, unless it be averred that the curator acted corruptly in accepting the security which he took.<sup>2</sup>

**481.** In terms of ss. 6 and 32 of the 1848 Act and s. 12 (5) of the 1875 Act an heir of entail in possession who seeks to disentail must produce a schedule setting forth the debts and provisions to husbands, wives, or children affecting, or that may be made to affect, the fee of the estate, or the heirs of entail, which are not secured by having been placed on the record. The validity and limits of family provisions are discussed below.<sup>3</sup> The right of third parties to object to disentail being granted, until security has been given for their rights and interests, is conferred by s. 6 of the 1848 Act, and depends upon whether their debts do or do not affect the entailed estate.<sup>4</sup> When a disentail had been carried through and instruments of disentail recorded without any provision being made for the protection of younger children's rights, which consisted in unsecured provisions in their favour in the disentailer's marriage contract which were not referred to in the schedule of debts produced in the disentail proceedings, the whole disentail proceedings were reduced on the ground that the terms of s. 6 of the 1848 Act had not been complied with, that the younger children had suffered injury thereby, and that an attempt to give them a good security over the fee-simple estate might be defeated by the existence of other creditors.<sup>5</sup>

**482.** An heir who has completed his title as nearest heir in existence is not debarred from disentailing by the possibility of the birth of a nearer heir,<sup>6</sup> nor by the condition that he is to forfeit the estate on succeeding to a peerage, to which he is then heir-presumptive;<sup>7</sup> but where the succession has already opened to another estate, and he has to denude of one, he cannot disentail either estate before making his

<sup>1</sup> *Farquharson v. Farquharson's Curator ad litem*, 1886, 14 R. 231.

<sup>2</sup> *Maxwell Heron v. Dunlop*, 1893, 21 R. 230.

<sup>3</sup> See para. 506, *infra*.

<sup>4</sup> *Baikie v. Kirkwall Educational Trust*, 1914 S.C. 860; *Glasgow Corporation v. Lord Blythswood*, 1920 S.C. 398; *Irving v. Irving*, 1871, 9 M. 539, per Lord Beuholm at p. 543.

<sup>5</sup> *Nicolson's Tr. v. Nicolson* (O.H.), 1925, S.L.T. 383.

<sup>6</sup> *Bruce*, 1874, 1 R. 740.

<sup>7</sup> *Forbes v. Burness*, 1888, 15 R. 797.



election.<sup>1</sup> Where, after a petition for disentail has been presented, an heir-substitute is born whose consent would have been required had he been born before the petition, he can only interfere if the consents required before his birth have not been valued,<sup>2</sup> but not after the date of the first interlocutor and of the last consent in the application being given.<sup>3</sup> The Court may dispense with consents where it is proposed only to sell a part of the estate;<sup>4</sup> and where no consents are required, it is in the discretion of the Court to order intimation on the next heirs.<sup>5</sup> It has, however, been said that "the correct practice in all entail petitions is to call the next three heirs of entail entitled to succeed, if there be three or more heirs in existence."<sup>6</sup> Money in the hands of trustees for the purchase of land to be entailed, or land in their hands which they have been directed to entail, may be treated as if it were already entailed estate, and paid or conveyed to the heir of entail if he could have disentailed the estate (1848, s. 27, 28; 1853, s. 8).

#### SUBSECTION (2).—*Power to Sell.*

**483.** (a) Under the Clan Acts,<sup>7</sup> which were passed with a view of civilising the Highlands after the rising of 1745, the heir in possession might sell any part of the estate to the Crown, for the erection of buildings, settlements, etc. The purchase money had to be applied in payment of entailer's debts or other effectual burdens on the entailed estate, or expended on other lands to be similarly entailed; and the direction to re-entail created a valid trust, which bound all persons taking any estate or interest in the newly-purchased lands.<sup>8</sup>

**484.** (b) For Redemption of the Land-Tax.<sup>9</sup>—Only a part of the estate might be sold, and the price had to be paid into the Bank of England. The power is now of small importance, but it has been decided in petitions under it that the terms of the statute must be rigidly adhered to;<sup>10</sup> and if they are so adhered to, then fraud on the part of the heir in possession will not affect a stranger purchaser;<sup>11</sup> but if the terms of the statute have not been adhered to, *bona fide* purchasers will be affected.<sup>12</sup> An error of judgment by the Court of Session in executing the Act was held not fatal to the sale.<sup>13</sup>

**485.** (c) To Public Bodies under Compulsory Powers.—This was first authorised by the Lands Clauses (Scotland) Consolidation Act, 1845,<sup>14</sup> which enacted that the price of the land taken should be consigned in bank, and might be applied, with the authority of the Court,

<sup>1</sup> *Home v. Home*, 1876, 3 R. 591.

<sup>2</sup> *Shand*, 1876, 3 R. 544.

<sup>3</sup> *Douglas v. Campbell* (O.H.), 1885, 12 R. 916.

<sup>4</sup> *Duke of Sutherland v. Marquess of Stafford*, 1892, 19 R. 504.

<sup>5</sup> *Davys*, 1870, 9 M. 44.

<sup>6</sup> *Rackstraw v. Douglas*, 1917 S.C. 284, per Lord Dundas at p. 293.

<sup>7</sup> 20 Geo. II. cc. 50 and 51.

<sup>8</sup> *Fleeming v. Howden*, 1868, 6 M. (H.L.) 113.

<sup>9</sup> 42 Geo. III. c. 116, ss. 61 *et seq.*

<sup>10</sup> *Wilson v. Elliott*, 1828, 3 W. & S. 60.

<sup>11</sup> *Wilson*, *supra*; *Lawrie v. Lawrie*, 1814, 2 Dow, 556.

<sup>12</sup> *Baird v. Neill*, 1835, 13 S. 927.

<sup>13</sup> *Earl of Wemyss v. Montgomery*, 1824, 2 Sh. App. 1.

<sup>14</sup> 8 Vict. c. 19, ss. 7–9, 67 *et seq.*

in the redemption of the land-tax; the discharge of any incumbrance affecting the land in respect of which the money is paid, or affecting other lands entailed on the same heirs; in purchase of other lands to be entailed on the same heirs; in removing or replacing buildings affected by the new operations; or in payment to any party absolutely entitled to the money (s. 67). The Rutherford Act (s. 26) allows an heir entitled to acquire the estate in fee-simple to apply to the Court for leave to uplift consigned money, and to acquire it in fee-simple; the section was held to apply when an application was made by an heir of entail in possession for payment of money derived from the redemption of casualties.<sup>1</sup> If not entitled to acquire the estate in fee-simple, then he shall apply the consigned money in payment of money laid out, or to be laid out, on improvements,<sup>2</sup> or for the other purposes specified in the section, and, if after applying it for these purposes there is a surplus of less than £200, he shall acquire it for his own use. A petitioner who could not have acquired the estate in fee-simple in 1848 but who could do so in virtue of supervening legislation was nevertheless held entitled to present a petition for the acquisition of a sum of less than £200 under s. 26.<sup>3</sup> The Act of 1853 allows the price of the part sold to be paid in the form of a feu-duty or annual payment (ss. 14–16). Where trustees conveyed an estate under an entail to the heir nominated in the trust deed, having previously sold to a railway company a part of the estate, the price of which had not yet been consigned, the heir, and not the trustees, was held entitled to uplift the price and apply it towards the cost of improvements executed by him.<sup>4</sup> The money may be applied in repayment of improvements on the part sold,<sup>5</sup> but not of improvements by another heir unless they have been constituted a debt against the estate.<sup>6</sup>

**486.** The expenses of a petition to uplift consigned money<sup>7</sup> (but not of applying it)<sup>8</sup> and of all conveyances of the land, including those of clearing up the title of a superiority purchased with part of the consigned money,<sup>9</sup> are paid by the company acquiring the part sold.<sup>10</sup> But where the purchase money was invested in the name of trustees, one of whom died, it was held that the corporation which acquired the land were not liable in the expenses of the note for the appointment of new trustees, which was dismissed as unnecessary.<sup>11</sup> The expenses of remits to men of business and of skill for reports fall to be paid by

<sup>1</sup> *Dick Lauder*, 1923 S.C. 434.

<sup>2</sup> See Improvement Expenditure, paras. 499 *et seq.*, *infra*.

<sup>3</sup> *Ross* (O.H.), 1926, S.L.T. 105.

<sup>4</sup> *Earl of Strathmore*, 1856, 18 D. 1212.

<sup>5</sup> *Hay*, 1879, 6 R. 1104.

<sup>6</sup> *Stewart*, 1863, 1 M. 897; *Lockhart*, 1852, 24 Sc. Jur. 587.

<sup>7</sup> *Lady Willoughby de Eresby v. Callander and Oban Rly. Co.*, 1885, 13 R. 70.

<sup>8</sup> *Stirling Stuart v. Caledonian Rly. Co.*, 1893, 20 R. 932; *Lord Hamilton of Dalryell v. Caledonian Rly. Co.* (O.H.), 1914, 1 S.L.T. 476; *Drummond Hay v. North British Rly. Co.*, 1873, 1 R. 180; cf. *Grant v. Edinburgh, Perth, and Dundee Rly. Co.*, 1851, 13 D. 1015.

<sup>9</sup> *M'Dowall* (O.H.), 1916, 2 S.L.T. 170.

<sup>10</sup> Lands Clauses Consolidation (Scotland) Act, 1845, ss. 79–81.

<sup>11</sup> *Earl of Morton v. Mags. of Edinburgh* (O.H.), 1917, 1 S.L.T. 18.

the company, but not the expenses of the service of the petition upon the next heirs of entail.<sup>1</sup>

**487.** (d) In Payment of Debts affecting the Fee of the Estate, including Entailer's Debts.—The clauses now regulating this power (1848, s. 25; 1853, s. 9; 1868, ss. 9–11) include among the debts which affect, or may be made to affect, the fee of the estate, debts of the entailer, and thus practically supersede the special power which had previously been given in the Rosebery Act (ss. 7 *et seq.*) “to heirs of entail in possession of an entailed estate liable to be adjudged or evicted for debts or obligations of the maker of the entail,” to sell a portion of the estate in payment of such debts. The power extends to all cases where the fee of the entailed estate is validly charged or may be lawfully chargeable with debt, or sums of money, and includes all cases where it is made competent by Act of Parliament so to charge the estate, *e.g.* with estate duty and settlement estate duty under the Finance Act, 1894.<sup>2</sup> Where the estate is so charged with Government duties the heir in possession is bound to keep down the charges on his inheritance and cannot charge the estate with accrued interest on the duties,<sup>3</sup> nor can he so charge it with the expenses incurred in settling the amount of the duties or for the expenses of the petition.<sup>4</sup> Where the proceeds of the sale of an estate are held by trustees as entailed money in virtue of the provisions of the 1882 Act, the executor of a deceased heir is entitled to recover from the trustees the amount of estate duty and succession duty paid by him, together with the expenses of the note by him craving authority.<sup>5</sup>

**488.** Where a private Act authorised the charging of the estate with debt, but directed that the debt should be exhausted by a series of annual payments, the heir was held entitled to exercise the power.<sup>6</sup> The part of the estate to be sold need not be the part affected by the debts,<sup>7</sup> and no consents are required.<sup>8</sup> The sale may be either by private bargain or by public roup, under the authority of the Court (1868, ss. 9, 10).

**489.** (e) General Power to sell with Consents.—The clauses dealing with this power (1848, s. 4; 1875, s. 6; and 1882, ss. 4, 13) follow naturally on the disentailing sections. The same consents necessary to be given in disentail proceedings<sup>9</sup> were required before the heir could “sell, alienate, or dispose” any part of the estate. If the heir in possession is in a position to disentail without consents, then no consents are required for the exercise of this power.<sup>10</sup>

<sup>1</sup> *Lord Blythswood v. Glasgow and South-Western Rly. Co.*, 1914 S.C. 726, per Lord Anderson (Ordinary).

<sup>2</sup> 57 & 58 Vict. c. 30; *Lord Advocate v. Earl of Moray's Trs.*, 1905, 7 F. (H.L.) 116; *Laurie*, 1898, 25 R. 636; *Callander-Brodie* (O.H.), 1904, 12 S.L.T. 474; *Kinloch* (O.H.), 1920, 2 S.L.T. 79; cf. *Orr-Ewing* (O.H.), 1920, 1 S.L.T. 259.

<sup>3</sup> *Robertson* (O.H.), 1914, 1 S.L.T. 492.

<sup>4</sup> *Laurie*, *supra*.

<sup>5</sup> *Bedell-Sivright's Curator Bonis* (O.H.), 1924, S.L.T. 17.

<sup>6</sup> *M'Kenzie v. M'Kenzie*, 1849, 11 D. 1115.

<sup>7</sup> *Kennedy-Erskine*, 1850, 13 D. 41.

<sup>8</sup> See para. 473, *supra*.

<sup>9</sup> *Riddell*, 1853, 15 D. 904.

<sup>10</sup> *Scott Plummer*, 1885, 12 R. 1349.



**490.** (*f*) Order of Sale under 1882 Act.—It is made lawful by the 1882 Act, s. 19, for “any heir of entail in possession of any entailed estate, or, where an entailed estate consists of land held in trust for the purpose of being entailed, for the person who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate, or part of it.” This enactment gives a power to apply to the Court to have the entailed estate converted into money, such money remaining subject to the fetters of the entail as a *surrogatum* for the estate. The effect of the Act is “to place the heir of entail in possession in the same position as a fee-simple proprietor in regard to the sale of his estate under the authority of the Court.”<sup>1</sup> The subsequent sections of the Act define the procedure requisite to carry out the sale, and regulate the investment of the entailed money.

**491.** The question as to whether lands are held in trust for the purpose of being entailed may give rise to difficulty, especially where the direction to the trustees is to pay off debts and thereafter to execute a deed of entail. If the direction to pay off debts is merely ancillary to the main purpose of the trust and subordinate to the direction to entail, an application under s. 19, on the ground that there is no possibility of extinguishing the debts, is competent.<sup>2</sup> Where a feu had been granted of certain lands, the superiority remaining in the heir of entail in possession, the feuars offered to renounce the feu and to pay a sum to the superior in consideration of being relieved of their obligations under the contract. It was argued, *inter alia*, for the heir of entail in possession that the transaction really amounted to a sale under s. 19, on the ground that he was selling his rights of superiority for a re-conveyance of the *dominium utile* and a monetary payment. The Lord Ordinary, however, merely granted the authority craved without delivering an opinion.<sup>3</sup>

**492.** The Court (s. 21) is directed to procure a report as to the value of the estate, and as to the rights and charges affecting it, and, “unless it shall appear that any patrimonial interest would be injuriously affected thereby,” to order the estate, or part of it, to be sold in such manner as it thinks proper, provided that, where the application is on behalf of a married woman, minor, pupil, or some other person under disability, the Court must be satisfied that the sale will be for the benefit of the applicant (s. 21). Sec. 22 gives the Court power to prescribe the time, place, and manner of the sale, and whether it shall be by public auction or private bargain, and provides that it shall not be by private bargain if either the applicant or the next heir shall intimate within a month after the order of sale that he desires it to be by public auction. The price of the estate must be consigned in bank,

<sup>1</sup> Per Lord Pres. Inglis in *Ballantine*, 1883, 10 R. 1061.

<sup>2</sup> *Earl of Rothes* (O.H.), 1918, 1 S.L.T. 164; see also *Marquess of Douglas* (O.H.), 1921, 1 S.L.T. 145.

<sup>3</sup> *Stirling Stuart* (O.H.), 1915, 2 S.L.T. 260.

or the equivalent in Consols transferred to the name of the Accountant of Court (s. 23 (1)). The Court provides for the payment of all debts affecting the estate, and may approve of the investment of the money in the name of trustees for the benefit of the heirs of entail in their order, or in the purchase of other lands to be entailed on the same heirs (s. 23 (4 and 5)). By s. 24 it is provided that where provisions to wives, etc., are secured upon the estate, due provision shall be made by the Court for their payment out of the capital of the fund into which the estate is converted, which is entailed estate within the meaning of the Entail Acts (s. 27).

**493.** In a recent case an heir of entail bound himself on re-marriage to make certain provisions for the children of the marriage, the amount varying according to the number of children. He presented a petition for sale of the entailed estates, and craved that the proceeds of sale should be invested in the name of trustees for behoof of himself and the subsequent heirs of entail in terms of s. 23. There were three children of the marriage at the date of the application, and the marriage-contract trustees, founding on ss. 23 (3) and 24, demanded that the amount of the provisions should be paid over to them. It was, however, held by the Lord Ordinary that the marriage-contract trustees were not entitled to succeed, and that the provisions of s. 24 would be satisfied by due provision being made for payment by the trustees, in whose names the fund was invested, to them of the proper sum if and when it became exigible, the trustees holding the entailed money for behoof of all interested.<sup>1</sup> Where trustees had been appointed under s. 23 and one of them had died, the competency of an application for the appointment of new trustees was questioned in virtue of the wide powers given to trustees under the provisions of the Trusts (Scotland) Act, 1921.<sup>2</sup> It was, however, held that the trust in question was constituted under a public Act of Parliament, and did not fall within the definition of trusts in the Trust (Scotland) Act, 1921, and that the application was, accordingly, competent.<sup>3</sup> By s. 23 (5) the Court has power to accept the resignation of or to remove trustees, and to appoint new or additional trustees. An important provision is hidden away in this subsection to the effect that a petition for sale shall remain a depending process for all purposes until the entail comes to an end.

#### SUBSECTION (3).—*Power to Excamb.*

See EXCAMBION.

#### SUBSECTION (4).—*Power to grant Feus and Leases.*

**494.** The Montgomery Act (ss. 1–8) first deals with the granting of building and agricultural leases. The latter might be granted for

<sup>1</sup> *Hope Vere* (O.H.), 1921, 2 S.L.T. 271.    <sup>2</sup> 11 & 12 Geo. V. c. 58, ss. 2 (a) and 3 (b).

<sup>3</sup> *Duke of Sutherland* (O.H.), 1922, S.L.T. 250.

fourteen years and one existing life named in the lease, or for two existing lives named in the lease, provided in both cases that the tenants fenced one-third of the lands leased in ten years, two-thirds in twenty years, and the whole in thirty years; or might be granted for a period of thirty-one years, provided that in any lease for a period of over nineteen years the tenant was bound to fence one-third of the land in one-third of the period, two-thirds in two-thirds, and the whole before the expiry of the lease (ss. 1 and 2). Such fences had to be kept in repair by the tenant (s. 3).<sup>1</sup> Building leases might be granted for a period of ninety-nine years (s. 4), but not more than five acres to one person, and the tenant was bound to erect a dwelling-house of £10 value on each half-acre within ten years of the lease, and keep it in order (s. 5). Non-fulfilment of the conditions nullifies the lease.<sup>2</sup> In the cases cited the question as to the validity of the leases granted was discussed. Neither the mansion-house, offices, or policies, nor any part of the estate within three hundred yards of the mansion-house, might be let (s. 6), and no grassum might be taken in consideration thereof (s. 7). But this only applies to a house which is clearly the mansion-house of the estate.<sup>3</sup> The tenant is entitled to cut down growing timber if necessary for the reasonable enjoyment of the part leased to him.<sup>4</sup>

**495.** The Rosebery Act (ss. 1 and 2) empowers an heir in possession to grant ordinary leases at a fair rent for twenty-one years, and mineral leases for a period of thirty-one years, but no grassum may be taken, and no lease of the mansion-house, home farm, or of the policies may be granted beyond the life of the heir in possession unless a more extensive power is contained in the deed of entail; but it is a question whether a lease granted for a longer period than that allowed by the deed of entail is valid even for the period allowed by the deed.<sup>5</sup> Salmon fishings, but not trout fishings, are proper subjects of a lease, leases of the latter merely creating a personal obligation upon the granter.<sup>6</sup> An exchange of salmon fishings for twenty-one years is not a lease for a fair rent.<sup>7</sup> On the termination of a mineral lease the heir in possession is not bound to restore the surface of the estate, even if he has received a payment from the tenant for the purpose.<sup>8</sup>

**496.** The Rutherford Act (s. 4) entitles the heir in possession to lease or feu the estate in whole or in part with the like consents which would enable him to disentail,<sup>9</sup> while s. 24 gives an heir under an old

<sup>1</sup> See *Hamilton v. Hamilton*, 1846, 9 D. 53.

<sup>2</sup> *Carrick v. Miller*, 1868, 6 M. (H.L.) 101; and see *Carter v. Lornie*, 1890, 18 R. 353; *M'Dowel v. M'Dowel*, 1904, 6 F. 575.

<sup>3</sup> *Montgomerie v. Vernon*, 1895, 22 R. 465.

<sup>4</sup> *Gordon v. Rae*, 1883, 11 R. 67.

<sup>5</sup> *Forbes v. Wilson*, 1873, 11 M. 454.

<sup>6</sup> *Earl of Galloway v. Duke of Bedford*, 1902, 4 F. 851; see later report of this case, 1904, 6 F. 971.

<sup>7</sup> *Lord Abinger's Trs. v. Cameron*, 1909 S.C. 1245; 2 S.L.T. 104.

<sup>8</sup> *Gould v. Gould's Trs.*, 1899, 2 F. 130.

<sup>9</sup> *Christie*, 1888, 15 R. 793; *Countess of Cromartie* (O.H.), 1909, 2 S.L.T. 19.



entail an absolute power, on giving notice to the heir of entail next entitled to succeed, to feu or grant long leases, with the authority of the Court, of not more than one-eighth part in value of the whole estate, for the highest feu-duty or rent that can be got, provided that no grassum is taken and with the usual exclusion of the mansion-house, etc.<sup>1</sup> A long lease here includes leases for a period exceeding in their duration acts of ordinary administration, *e.g.* a sporting lease for nineteen years.<sup>2</sup> The Act of 1853 (s. 6) provides that continuing petitions may be presented for authority to feu and grant long leases of not more than one-eighth in value of the whole estate, and that the Court shall fix the minimum feu or tack duty at which the lands may be feued or let, which rate will continue to be acted on, unless the heir in possession, or any other party entitled to appear, move the Court to alter it, which may be done by minute under the original petition; <sup>3</sup> and s. 13 extends to an heir in possession under a new entail, which does not expressly exclude feuing or building leases, the same powers of granting feus and leases for more than twenty-one years as are conferred by the Rutherford and Montgomery Acts on heirs in possession under old entails.

**497.** By the Act 1868, ss. 3-5, power is given to grant building leases for ninety-nine years, or feus, of any portion of the estate on application to the Sheriff, who thereupon gives notice to the next heir and inquires into the circumstances; but no grassum is allowed to be taken by the heir, and any feu or lease granted will be void unless buildings of at least twice the value of the feu or rent are erected within five years, and thereafter kept in order. It is not sufficient that the buildings have been erected before the feu is granted.<sup>4</sup>

**498.** By the Act 1882, s. 4, power is given to heirs in possession under a new entail to feu and grant long leases, subject to the like conditions and with the same consents as had previously been given to heirs holding under old entails; s. 5 authorises all applications to grant leases to be made to the Sheriff; and s. 6, the granting of feus or leases of a portion of the estate, not exceeding two acres, for any purpose of public utility, at an adequate feu-duty or rent, upon application to the Court of Session or the Sheriff. The same Act (ss. 8 and 9) authorises the heir in possession to grant a new lease two years before the expiry of the existing lease, and at a reduction of rental. By the 1914 Act (s. 4) extended powers of feuing are conferred upon heirs of entail in possession.<sup>5</sup> In all leases granted by heirs of entail where the granter comes under obligations of a personal character to the tenant, which, had he survived, he could not have charged on the estate (1878, ss. 1 and 2), *e.g.* to take over sheep stock at the termination of the lease, such obligations do not transmit against the succeeding heirs of entail,

<sup>1</sup> *Duke of Portland* (O.H.), 1909, 1 S.L.T. 72.

<sup>2</sup> *Earl of Kinnoull*, 1862, 24 D. 379.

<sup>5</sup> See para. 516, *infra*.

<sup>2</sup> *Farquharson*, 1870, 9 M. 66.

<sup>4</sup> *Stewart v. Murdoch*, 1882, 9 R. 458.

but against his personal representatives.<sup>1</sup> The effect of s. 5 of the 1914 Act is to throw the burden of taking over sheep stock at the termination of the lease upon the heir of entail in possession when the condition or obligation becomes prestable, thus altering the law laid down in the three first cases last cited.<sup>2</sup>

SUBSECTION (5).—*Power to charge Improvement Expenditure.*

**499.** This was first introduced by the Montgomery Act, 1770, it being considered, in the words of that Act, that "it may be highly beneficial to the public if proprietors of entailed estates were encouraged to lay out money in enclosing, planting, or draining, or in erecting farmhouses and offices or outbuildings" (s. 9). These improvements, the cost of which may be charged against the estate, are known as Montgomery Improvements, and the mode of constituting them is provided for in that Act (ss. 9–31). The list of improvements that may be charged has now been largely extended, and the method of constituting the debt simplified, by later Acts which have practically superseded, though they have not repealed, the Montgomery Act. An heir of entail who adopts the procedure of the later Acts is held to have abandoned his position under the Montgomery Act.<sup>3</sup> The Rutherford Act (s. 13) deals with improvements executed by an heir of entail prior to 1st August 1848, while s. 14 provides that where an heir in possession has executed improvements (*i.e.* Montgomery Improvements) subsequent to the passing of the Act, and has obtained decree for three-fourths of the amount expended thereon, he may execute a bond of annual-rent over the entailed estate during the period of twenty-five years from and after the date of the decree, at an annual rate not exceeding £7, 2s. per £100 of the whole of the sums expended. This section, which only applied to old entails, has been made applicable to all entails (1882, s. 4). Where an heir under an entail dated prior to 1st August 1848 has executed Montgomery Improvements and has not obtained decree therefor, he may petition the Court for authority to grant bonds of annual-rent as though decree has been obtained (1848, s. 16). The power under this section has also been extended to new entails, and to all trusts, of whatever date, under which land is held for the purpose of being entailed (1868, s. 18).

**500.** The heir in possession is bound to pay and keep down the annual-rents yearly, but no creditor in a bond of annual-rent can affect the rents or profits of the estate for arrears of payment beyond two years' annual-rent; and unless the estate can be disentailed without consents, no bond of annual-rent can be made the ground of adjudica-

<sup>1</sup> *Gillespie v. Riddell*, 1909 S.C. (H.L.) 3; *Riddell's Exrs. v. Milligan's Exrs.*, 1909 S.C. 1137; *Gardiner v. Stewart's Trs.*, 1908 S.C. 985; see also *Lord Sempill v. Leith Hay*, 1903, 5 F. 868.

<sup>2</sup> See para. 517, *infra*.

<sup>3</sup> *Marquess of Breadalbane's Trs. v. Campbell*, 1868, 6 M. (H.L.) 43.

tion (1848, ss. 17, 22). The heir in possession may charge the fee and rents of the estate, other than the mansion-house, offices, and policies thereof, with a bond and disposition in favour of any person who may advance the money for two-third parts of the sum on which the amount of such bond of annual-rent is calculated (1848, s. 18), but if he dies after constituting the debt against the succeeding heirs but without exercising the option conferred upon him by this section, the option does not transmit to the succeeding heir, who can be compelled by the executors of the last heir to execute a bond of annual-rent in their favour;<sup>1</sup> the two-thirds limit is now extended to three-fourths, whether the improvements have been executed at the date of the application or are merely contemplated (1882, s. 6 (1)); and where one-fourth of the rent-charge has been defrayed by the heir, he may substitute a bond and disposition for the remainder, but without the necessity of obtaining any consents, and irrespective of the date at which the improvements were charged (1882, s. 6 (4)).

**501.** The 25th and 26th sections of the Rutherfurd Act first introduce the expression "permanent improvements" as one of the objects to which an heir in possession may apply money obtained by the sale of a portion of the estate, or in respect of damage done to the estate under an Act of Parliament, or money settled in trust for the purchase of land to be entailed. These sections confer no power to charge the estate for money expended on permanent improvements, and the expression has been held to apply to many things which are not included among Montgomery Improvements, such as trenching,<sup>2</sup> and even the procuring of a renunciation of a long building lease.<sup>3</sup> But the definition clause of the Act, 1875 (s. 3) contains a long list of improvements which, on the one hand, are not included in the Montgomery Act, and, on the other, are not all of the nature of permanent improvements; and by s. 7 the heir in possession is authorised to borrow money to defray the cost of such improvements as may have been executed within twenty years of the date of the application, or which are merely in contemplation, provided the Court (which now includes Sheriffs and Sheriff-Substitutes (1882, s. 5)) is satisfied that the improvements are of a substantial nature and beneficial to the estate.<sup>4</sup> It is unnecessary here to refer to the decisions as to what do or do not constitute improvements under the above Acts.

**502.** In terms of s. 8 of the 1875 Act, the estate may be charged with a bond of annual-rent for twenty-five years, at a rate not exceeding £7, 2s. per £100 authorised to be borrowed, or with a bond and disposition in security for three-fourths (1882, s. 6 (1)) of the sum on which the amount of such bond of annual-rent would be calculated. It has been held that the rate is not at the option of the charger, but should be such as the market at the time warrants.<sup>5</sup> The expenses of

<sup>1</sup> *Nasmyth's Exrs. v. Nasmyth*, 1877, 4 R. 973.

<sup>2</sup> *Skene*, 1857, 19 D. 964.

<sup>3</sup> *Marquis of Huntly*, 1868, 6 M. 553

<sup>4</sup> *Fogo*, 1877, 5 R. 319.

<sup>5</sup> *Cadell* (O.H.), 1897, 34 S.L.R. 640; *Murray Stewart* (O.H.), 1898, 36 S.L.R. 623.



the application to charge may be included in the bond, but only to the extent of three-fourths of the actual or estimated costs.<sup>1</sup> Provision is made in s. 9 of the 1875 Act by which the heir in possession, with the consent of the nearest heir at the time and of the creditor in a bond of annual-rent affecting the estate, and granted in respect of improvements charged against the estate prior to the date of the Act, may substitute a bond and disposition in security for the portion then remaining unpaid, but exclusive of the expenses of the application;<sup>2</sup> while by s. 6 (4) of the 1882 Act the consent of the nearest heir is dispensed with where one-fourth of the capital sum borrowed on rent-charge has already been paid off, and the application may be made irrespective of the date at which the improvements were charged.

**503.** By the 1875 Act (s. 11), where an heir in possession has executed improvements but has not charged them before his death, he may nevertheless expressly bequeath, convey, or assign them to any person, who is thereupon entitled to petition the Court to ordain the next heir in possession to grant a bond over the estate in his favour. By the same Act (s. 7) it is provided that an heir may not charge in respect of improvements executed more than twenty years before the application for authority to charge is made to the Court. Accordingly, assignees presenting a petition after the death of the heir are only entitled to a charge upon the estate for expenditure incurred within twenty years from the presentation of their petition and not from the death of the heir.<sup>3</sup> A general disposition of the testator's estate does not imply an express bequest of such improvement expenditure,<sup>4</sup> and the right conveyed is *sua natura* heritable.<sup>5</sup>

**504.** All the above powers, which were, by the 1875 Act, confined to heirs possessing under old entails, have been extended to heirs possessing under new entails (1878, s. 3; 1882, ss. 4, 6 (1)). The short Act passed in 1878 provides that any obligation undertaken by an heir in possession, in a lease or agreement with a tenant, with reference to improvements to be executed by the tenant during his tenancy, or in a contract with any person in respect to improvements to be executed on the estate, shall, after the death of the said heir in possession, devolve and be binding on the next heirs of entail, who are bound to relieve his executors (ss. 1 and 2), but only to the extent to which the granter of the lease, if he had made the improvements himself and had lived to charge them, could have charged them,<sup>6</sup> and that only to the extent of three-fourths of the improvement debt.<sup>7</sup> The Act of 1882 contains two other sections (ss. 7 and 23) relating to

<sup>1</sup> *Leith v. Leith*, 1888, 15 R. 944; *Earl of Kinnoull v. Haldane*, 1911 S.C. 1279; see also, on question of expenses in applications to charge, *MacLaine v. Ranken*, 1878, 5 R. 1053; *Stewart*, 1886, 13 R. 568.

<sup>2</sup> *Stewart*, *supra*.

<sup>3</sup> *Scott's Trs.* (O.H.), 1927, S.L.T. 16.

<sup>4</sup> *Maxwell*, 1877, 4 R. 1112.

<sup>5</sup> *Earl of Kintore v. Countess Dowager of Kintore*, 1885, 12 R. 1213.

<sup>6</sup> *Shepherd's Exrs. v. Mackenzie*, 1913 S.C. 144.

<sup>7</sup> *Shepherd's Exrs.*, *supra*; *Earl of Kinnoull*, *supra*.

the method in which the amount chargeable for improvements may be ascertained in proceedings for sale or for disentail. The decisions as to the application of the price of a part of the estate which has been sold in payment of improvement expenditure have been already referred to.<sup>1</sup>

**505.** In addition to the powers of charging under the Entail Acts, an heir may, in terms of the Improvement of Land Act, 1864,<sup>2</sup> charge the estate with money subscribed for the construction of canals or railways, which may permanently increase the value of the estate. With reference to *quoad sacra* parish churches<sup>3</sup> and to glebes,<sup>4</sup> the statutes undernoted may be referred to. As to the power of heirs of entail under the Agricultural Holdings Act, see AGRICULTURAL HOLDINGS ACTS.<sup>5</sup>

#### SUBSECTION (6).—*Power to grant Family Provisions.*

**506.** The Aberdeen Act, which proceeds on the narrative that it had become expedient to confer on heirs of entail the power to grant adequate provisions to their wives or husbands and children, deals entirely with this subject. The Act is now regarded as incorporated in every deed of entail.<sup>6</sup> It enacts that a liferent annuity not exceeding one-third part of the free yearly rents or value of the estate may be settled on the widow of an heir in possession (s. 1); that a liferent not exceeding one-half of the free yearly rental or value, or one-third if there be already a similar liferent, may be settled on the husband of an heir in possession (s. 2); that only two liferent provisions to wives or husbands shall be subsisting at any one time on an entailed estate (s. 3); and that a bond of provision for the children of an heir in possession, of an amount not exceeding one year's free rental or free yearly value of the estate in the case of one child, two years in the case of two children, and three years in the case of three or more children, may be granted by the heir in possession, binding the succeeding heirs to make payment of the same out of the rents or proceeds of the entailed estate (s. 4). Provisions to children may now be made to affect the fee of the estate (1848, s. 21; 1853, s. 7). Similar provisions may now also be made by the heir-apparent for his wife and children (1868, s. 6); and where both the heir-apparent and the heir in possession have made provisions and the former predeceases the latter, at whose death no steps have been taken to charge the provisions in favour of the heir-apparent's children on the estate, the amount payable to the heir-apparent's children falls to be calculated without deduction of the provisions for the heir in possession's children which do not become

<sup>1</sup> See para. 487, *supra*.

<sup>2</sup> 27 & 28 Vict. c. 114, amended by 30 & 31 Vict. c. 101, s. 115; 31 & 32 Vict. c. 89, s. 6; 40 & 41 Vict. c. 31, s. 5; and 45 & 46 Vict. c. 38, ss. 30, 64.

<sup>3</sup> 7 & 8 Vict. c. 44.

<sup>4</sup> 29 & 30 Vict. c. 71, s. 17.

<sup>5</sup> Vol. I. p. 241, *ante*.

<sup>6</sup> *Callander v. Callander*, 1869, 7 M. 777, per Lord Pres. at p. 786; Act, 1868, s. 8.

operative till his death;<sup>1</sup> where both the heir-apparent and the heir in possession have died, the succeeding heir is liable for the provisions in favour of the children of both, even though they exceed three years' free rental of the estate.<sup>1</sup>

**507.** Provisions may also be made by the heir in possession for the issue of any predeceasing child (1875, s. 10). These provisions to widows and children are commonly termed "Aberdeen provisions." The provision to children is only effectual to such children as survive the heir in possession, unless the provision form part of the marriage-contract funds of a predeceasing child,<sup>2</sup> or the predeceasing child leave issue (1875, s. 10); and where the estate is already burdened to the full extent of three years' free rental for children's provisions (granted under the Aberdeen Act, and not in virtue of a special power),<sup>3</sup> no further exercise of the power will take effect until the existing provisions have been reduced in amount (1824, s. 6). But where the provisions have been charged by way of bond on the fee of the estate (1848, s. 21), they are treated as debts, and the interest on the bonds is deducted in calculating the "free rental."<sup>4</sup> Where any provisions exceed the statutory limit, they are voidable *quoad* such excess, but no further (1824, s. 7), unless they are granted under special powers contained in the deed of entail (1824, s. 12).

**508.** An heir in possession has right to grant a bond of provision even though he has not made up his title by virtue of the provisions of the Conveyancing Act, 1874, s. 9;<sup>5</sup> and if, subsequent to granting provisions, he denudes of the estate under a clause of devolution, the bonds remain valid, the free rental being calculated as at the charger's death and not at the date of devolution.<sup>6</sup> An heir whose title is defeasible by the birth of a nearer heir cannot validly make provisions.<sup>7</sup> After sequestration an heir cannot competently grant provisions without the consent of his trustee,<sup>8</sup> but under certain circumstances a *curator bonis* may charge the estate with provisions, with the concurrence of those parties who would have a title to object.<sup>9</sup> The widow's right to arrears of her annuity as well as to annuities due after infeftment is made preferable by infeftment to that of an adjudger of a succeeding heir's life-interest,<sup>10</sup> and where the heir in possession has been sequestrated and the estate sold, the widow of a former heir is entitled to be ranked on the price for the value of her annuity and the arrears thereof, even though the total sum claimed may be greater than the total sum with which the estate can be burdened under the Aberdeen Act.<sup>8</sup> Where

<sup>1</sup> *Earl of Haddington* (O.H.), 1919 S.C. 727.

<sup>2</sup> 1824, s. 5; *Chancellor's Trs. v. Sharple's Trs.*, 1896, 23 R. 435.

<sup>3</sup> *Lockhart v. Lockhart*, 1853, 15 D. 914; *Earl of Eglinton*, 1863, 1 M. 386.

<sup>4</sup> *Brodie v. Brodies*, 1867, 6 M. 92; *Balfour-Melville v. Duncan*, 1903, 5 F. 1079.

<sup>5</sup> 37 & 38 Vict. c. 94; *M'Adam v. M'Adam*, 1879, 6 R. 1256.

<sup>6</sup> *Hunter Blair v. Hunter Blair*, 1899, 1 F. 437; see also *Dalrymple v. Hunter Blair*, 1900, 7 S.L.T. 351.

<sup>7</sup> *Earl of Kinnoull's Trs. v. Drummond*, 1869, 7 M. 576.

<sup>8</sup> *Somervell's Tr. v. Somervell*, 1909 S.C. 1125.

<sup>9</sup> *Gordon's Curator Bonis*, 1902, 4 F. 577.

<sup>10</sup> *Boyd v. Boyd*, 1851, 13 D. 1302.



a wife divorces her husband she does not lose her provision, which is not conditional upon her being his wife at the date of his death, but payment is postponed till his death.<sup>1</sup>

**509.** The "free yearly rental" includes the royalties payable by the lessees of minerals for the year of the granter's death, irrespective of the probable exhaustion of the minerals in the near future.<sup>2</sup> Feu-duties are included even where the vassal is insolvent and the duties have not been paid for two years,<sup>3</sup> and duplicands of feu-duties but not other casualties of superiority;<sup>4</sup> but the actual sums paid in the year would probably now be taken, as in the case of mineral rents, and not an average as in *Hume Campbell*.<sup>5</sup> "The estate" includes all the subjects that may be included in the entail,<sup>6</sup> including the interest of money held in trust to purchase additional land to be entailed,<sup>7</sup> and of compensation money—the rate of interest being taken as that actually being received at the granter's death<sup>3</sup>—but does not include the mansion-house, offices, and policies.<sup>8</sup> But the question as to whether an old mansion-house still remains the mansion-house of the estate is one of fact; where a mansion-house no longer presents the character and amenity of the mansion-house of an entailed estate, its rental will be included in the rental on which the provisions are calculated.<sup>9</sup>

**510.** The deductions authorised by s. 1 of the Aberdeen Act, in order to arrive at the "free rent" of the estate, do not include expenses of management,<sup>10</sup> nor income tax upon the rental of the estate,<sup>11</sup> nor personal debts of the heir in possession,<sup>12</sup> but do include the interest on provisions granted under the Act, or under a special power in the deed itself.<sup>13</sup> Under a special clause in a deed of entail in which the expression "free rent" was used in the same sense as in the Aberdeen Act (s. 4), there were allowed as deductions, in estimating the "free rent," interest on debts affecting the estate and interest on estate duty, but not the expenses of bonds and dispositions in security for the amounts of the provisions out of the estate duty. The case was a very special one, which did not depend for its decision upon a construction of the Aberdeen Act.<sup>14</sup> But when a widow's annuity has not become immediately effectual against the estate, owing to the existence of a prior annuity at the granter's death, then the amount of the prior annuity is not a proper deduction from the free rent in estimating the value of the second

<sup>1</sup> *Somervell's Tr. v. Dawes*, 1903, 5 F. 1065; *Wilson v. Pearson* (O.H.), 1908, 15 S.L.T. 1046.

<sup>2</sup> *Lord Belhaven and Stenton*, 1896, 23 R. 423.

<sup>3</sup> *Lamont-Campbell v. Carter-Campbell*, 1895, 22 R. 260.

<sup>4</sup> *Murray v. Hume Campbell* (O.H.), 1895, 2 S.L.T. 435.

<sup>5</sup> *Supra*; *Lord Belhaven* (O.H.), 1892, 2 S.L.T. 170.

<sup>6</sup> Per Lord Pres. Boyle in *Wellwood v. Wellwood*, 1848, 10 D. 1480, at p. 1485.

<sup>7</sup> *Paterson v. Paterson*, 1888, 15 R. 1060.

<sup>8</sup> *Leith v. Leith*, 1862, 24 D. 1059; *Marquess of Northampton*, 1898, 35 S.L.R. 941.

<sup>9</sup> *Logan* (O.H.), 1911, 49 S.L.R. 26; 2 S.L.T. 322; cf. *Marquess of Northampton*, *supra*.

<sup>10</sup> *Earl of Galloway v. Dowager Countess of Galloway*, 1903, 6 F. (H.L.) 1.

<sup>11</sup> *MacLaine v. MacLaine*, 1845, 8 D. 150.

<sup>12</sup> *Cochrane v. Cochrane*, 1846, 9 D. 173.

<sup>13</sup> *Brodie v. Brodies*, 1867, 6 M. 92; *Balfour-Melville v. Duncan*, 1903, 5 F. 1079.

<sup>14</sup> *Mackintosh v. Mackintosh*, 1913 S.C. 31.

annuity, though the interest of the provisions is a proper deduction.<sup>1</sup> Other proper deductions are current rent-charges<sup>2</sup> and interest on improvement bonds, even though no interest had been demanded or paid during the granter's lifetime.<sup>3</sup>

**511.** Where, under a special power, a husband was given a liferent of the whole estate, there was held to be no "free rent."<sup>4</sup> In granting provisions to children, the power may be exhausted in favour of one child.<sup>5</sup> Opinions have been expressed that a bond binding personal representatives in favour of children does not prevent the execution of a valid Aberdeen provision.<sup>6</sup> A discharge may be granted by the children of their provisions, but in certain circumstances the right may revive.<sup>7</sup> The power to make children's provisions affect the fee of the estate, granted by the Rutherford Act (s. 21), does not apply where the provisions are granted under a special power inconsistent with the idea of the provisions affecting the estate;<sup>8</sup> but the terms of the special power must be very explicit to exclude this section.<sup>9</sup> The bond and disposition affecting the estate may be granted in favour of any person advancing the amount of the children's provisions (1853, s. 7), including the granter himself,<sup>10</sup> and may contain a power of sale (1853, s. 23), but can only be charged on the estate with the authority of the Court (1848, s. 23). The heir in possession is bound to keep down the interest on such bonds and dispositions, and the remedy competent to the creditor against the estate is limited to the principal sum and two years' interest thereon (1848, s. 22). Where an estate is disentailed, provisions affecting it may, with the consent of the creditors, be transferred to another estate, entailed on the same series of heirs, to the extent to which such other estate may be lawfully charged with such debt (1882, s. 10). In estimating the amount of security to be given for family provisions when an estate is disentailed, the rental is taken as at the date of the disentail, and security must be given for the maximum amount chargeable;<sup>11</sup> and where the estate is sold under an order of sale, provisions to husbands, wives, or children are directed to be paid out of the capital or income of the estate or fund into which the entailed estate is converted, or otherwise to the satisfaction of the Court (1882, s. 24). Where the direction in a bond of provision for a widow was to pay the annuity half-yearly, beginning at the first term after the granter's death, the widow was held entitled to a full half-year's

<sup>1</sup> *Brodie v. Brodie*, 1867, 6 M. 92; *Dunbar v. Dunbar*, 1872, 11 M. 200; cf. *Morison v. Morison*, 1894, 21 R. 538; *Boyd v. Boyd*, 1851, 13 D. 1302.

<sup>2</sup> *Lord Saltoun*, 1887, 24 S.L.R. 352; cf. *Earl of Glasgow*, 1886, 14 R. 59.

<sup>3</sup> *Grierson* (O.H.), 1887, 25 S.L.R. 549.

<sup>4</sup> *Maitland v. Maitland*, 1849, 12 D. 416.

<sup>5</sup> *Antrobus v. Innes*, 1830, 9 S. 70; *Paterson v. Paterson*, 1888, 15 R. 1060.

<sup>6</sup> *Breadalbane v. Marquis of Breadalbane*, 1840, 2 D. 904, at p. 917; see also subsequent case between the same parties, 1840, 2 D. 944.

<sup>7</sup> *Duke of Roxburghe v. Russell*, 1881, 8 R. 862. <sup>8</sup> *Campbell*, 1854, 16 D. 396.

<sup>9</sup> *Seymer*, 1859, 21 D. 361; *Hope Johnstone v. Hope Johnstone*, 1880, 8 R. 160; *Jardine v. Grant*, 1891, 18 R. 870.

<sup>10</sup> *Robertson*, 1872, 10 M. 966.

<sup>11</sup> *Earl of Glasgow*, 1886, 14 R. 59.

annuity at that term.<sup>1</sup> It is incompetent for an heir in possession to present a petition to fix the amount of the annuity of the widow of a predeceasing heir<sup>2</sup> unless the petition also asks for an order to charge.<sup>3</sup>

### PART III.—THE ENTAIL (SCOTLAND) ACT, 1914.<sup>4</sup>

#### SECTION 1.—PROHIBITION OF FUTURE ENTAILS.

**512.** Many of the sections of this Act have already been referred to in dealing with the appropriate topics under Part II. of this article. The Act was passed on 10th August 1914, immediately after the outbreak of the European War, and its importance was, perhaps, rather lost sight of at the time. The radical change in the entail legislation affecting Scotland is effected by s. 2, which provides that the Act of 1685 “shall not apply to any deed relating to land in Scotland dated after the passing of this Act, the effect of which would be to entail such land, and no such deed shall be recorded in the Register of Entails; and any prohibition of alienation, contracting debt, or altering the order of succession, and any clause of consent to registration in the register of entails in any such deed shall be null and void.” The whole trend of legislation down to 1882 was to grant all possible facilities to heirs of entail in dealing with the entailed estate, while recognising the sanctity of entails. The provision above quoted sweeps away one of the most deep-seated conceptions of land-ownership in Scotland, and prevents land-owners from settling their estates upon a series of heirs in the manner which had been recognised as legal since 1685.

**513.** The section further provides (s. 2 (a)) that where, at the passing of the Act, any Act of Parliament, deed, or writing is in operation, whereby money or other heritable or moveable property is held or invested for the purpose of purchasing land to be entailed, or whereby any land is directed to be entailed, but the direction has not been carried into effect, the date at which such deeds, etc., first come into operation shall, for the purposes of the section, be held to be the date of any entail to be made in execution of the trust or direction, whatever be the actual date of such entail. The wording of this section is identical with that of s. 28 of the 1848 Act, the decisions under which have already been referred to.<sup>5</sup> But that Act was passed to facilitate and not to abolish disentails, and by dating the entail at the date of the deed directing entail, rather than at that at which it fell to be executed, “the object of the statute was facilitated, for an heir of entail in possession was entitled to disentail without consents if he was born after the date of the entail.<sup>6</sup> When an heiress of entail came under an obligation to re-entail in the event of her disentailing the lands, and

<sup>1</sup> *Lamont-Campbell*, 1895, 22 R. 260.

<sup>2</sup> *Carter-Campbell v. Lamont-Campbell*, 1894, 21 R. 614; 1895, 22 R. 260.

<sup>3</sup> *Lord Belhaven and Stenton*, 1896, 4 S.L.T. 170; *Campbell v. Campbell*, 1908, 16 S.L.T. 67.

<sup>4</sup> 4 & 5 Geo. V. c. 43.

<sup>5</sup> See para. 476, *supra*.

<sup>6</sup> *Elliott Lockhart's Trs. v. Elliott Lockhart*, 1927 S.C. 614, per Lord Hunter at p. 620.



disentailed after the passing of the 1914 Act, it was held that she was not bound to re-entail, since the obligation only came into operation at the date of the disentail petition when it was, by the operation of the Act, impossible for her to re-entail. This decision is hard to reconcile with the earlier decisions under the 1848 Act.<sup>1</sup> Where trustees were directed to convey certain lands by a deed of strict entail under a deed which was dated before the passing of the 1914 Act, but under which no entail had been created until after the passing of the Act, it was held that they were bound to execute a disposition in favour of the heirs named, containing all the provisions set forth in the settlement "other than the provisions for a strict entail."<sup>2</sup>

**514.** It is further provided by the Act (s. 2 (b)) that for the purposes of the section, any *mortis causa* deed made and executed before the passing of the Act by a person alive at the date of the passing of the Act shall be deemed to be dated after the Act, except where the maker dies within twelve months after the passing of the Act or has ceased to be of sound disposing mind within that period.

#### SECTION 2.—VALUATION OF INTEREST OF EXPECTANT HEIRS.

**515.** The provisions of the Act (s. 3) regarding the valuation and consignment of the ascertained value of an heir's expectancy have already been noticed in dealing with disentail.<sup>3</sup>

#### SECTION 3.—POWER TO FEU.

**516.** Sec. 4 deals with the power of an heir in possession to grant feus and provides that, notwithstanding the provisions of any deed of entail or Act of Parliament, any heir of entail may grant feus of any part of the estate, save the mansion-house, policies, etc., in so far as the latter are necessary to the amenity of the mansion-house, at such feu-duty as he thinks fit. Before feuing, the heir in possession must obtain the consent of the nearest heir if he is of lawful age and subject to no legal incapacity, and the feu charter or other deed must be signed by the nearest heir. If the nearest heir refuses to consent or is incapable of consenting, owing to non-age or legal incapacity, provision is made for the Sheriff of the county in which the lands are situated finding that the granting of the feu is in accordance with the provisions of the Act, and that the feu-duty is fair and reasonable. Under the section it is rendered illegal to feu more than ten acres of land to the same person and to take any grassum or valuable consideration other than the feu-duty.

#### SECTION 4.—OBLIGATIONS AS TO SHEEP STOCK.

**517.** The burden thrown upon the personal representatives of a deceased heir of entail in possession in cases where the heir had come

<sup>1</sup> E.g. *Black v. Auld*, 1873, 1 R. 133; *Earl of Mansfield v. Lord Scone's Tutor*, 1908 S.C. 459; *Baird v. Baird's Tutor*, 1922 S.C. 637; see para. 476, *supra*.

<sup>2</sup> *Lumsden's Trs. v. Lumsden*, 1917 S.C. 579.

<sup>3</sup> See para. 479, *supra*.

under a personal obligation to take over a tenant's sheep stock at the end of the lease<sup>1</sup> was alleviated in the 1914 Act (s. 5). This section provides that, subject to the limitation of an heir for the debts of his ancestor to the value of the estate as provided for in s. 12 of the Conveyancing Act, 1874,<sup>2</sup> any contract undertaken by an heir of entail to take over the sheep stock of a farm from the tenant at the termination of the lease shall, in the case of the lessor's death before the fulfilment of the condition and to the extent of the normal sheep stock of the farm and the value thereof to an incoming tenant, devolve and be binding upon the heir of entail in possession when the condition becomes prestable. The other heirs and the personal representatives of the lessor are, unless the lessor has otherwise provided, entitled to be relieved of the obligation by the heir in possession upon whom the burden of taking over the sheep stock is imposed and to repayment of any sums which they may have been liable to pay and have paid under the previously existing law. Provision is made (s. 5 (2)) for the valuation of the sheep stock by a single arbiter appointed by the parties mutually, whom failing by the Board of Agriculture for Scotland, and the procedure in arbitrations is regulated by the rules set out in the Second Schedule of the Agricultural Holdings (Scotland) Act, 1908,<sup>3</sup> with certain exceptions. The right of tenants to enforce obligations to take over sheep stock against the heirs and personal representatives of the lessor is preserved (s. 5 (3)), and the section does not apply to obligations undertaken in any lease which terminated before the passing of the Act or in any contract or agreement ancillary to such lease (s. 5 (4)).

#### SECTION 5.—LEASE OF MANSION-HOUSE.

**518.** The Act (s. 6) deals with the effect of the death of an heir of entail in possession upon a subsisting lease of the mansion-house. Its terms have already been noticed.<sup>4</sup>

#### SECTION 6.—GROWING TIMBER.

**519.** Contracts by an heir in possession for the sale of growing timber are dealt with by the 1914 Act (s. 7). In the absence of express stipulation<sup>5</sup> heirs of entail in possession have a very wide power of cutting ripe wood,<sup>6</sup> save in so far as it is necessary for the reasonable enjoyment of the mansion-house.<sup>7</sup> The heir may cut down all the wood which is ripe, but must not cut down unripe wood and so defeat the expectations of subsequent heirs of entail.<sup>8</sup> Thinning is an act of ordinary administration, and is necessary for the improvement of the wood.<sup>9</sup> The power to cut wood may be exercised by purchasers of the

<sup>1</sup> *Gillespie v. Riddell*, 1909 S.C. (H.L.) 3, and other cases *cit. supra.*, para. 476.

<sup>2</sup> 37 & 38 Vict. c. 94.

<sup>3</sup> 8 Edw. VII. c. 64.

<sup>4</sup> See para. 453, *supra.*

<sup>5</sup> *Humily's Trs. v. Hallyburton's Trs.*, 1880, 8 R. 50.

<sup>6</sup> *Boyd v. Boyd*, 1870, 8 M. 637, at p. 642.

<sup>7</sup> *Boyd, supra.*, at p. 644.

<sup>8</sup> *Bontine v. Graham's Trs.*, 1827, 6 S. 74.

<sup>9</sup> *Boyd, supra.*, at p. 643.

right from the heir in possession, or lessees or consignees, but such purchasers and others are not entitled to proceed after the death of their author, even though willing to account to the heirs then succeeding.<sup>1</sup> Tenants under a building lease may cut timber on the lands leased to them,<sup>2</sup> and a trustee for creditors may exercise the powers,<sup>3</sup> but the duty of a *curator bonis* to a lunatic is to preserve his ward's estate and to keep things going rather than to change.<sup>4</sup> Further, when an heir of entail in possession sells the lands with the timber thereon, he is entitled to have the value of the ripe timber paid over to him personally, and does not require to consign it in name of trustees as entailed money.<sup>5</sup>

**520.** Trees, while attached to and unseparated from the ground, are *partes soli* and belong to the proprietor as an accessory and not as a distinct and separate subject or estate. Prior to 1914, while it was legal for a proprietor to enter into a contract for the sale of the timber on his estate or to lease the timber to one person and the lands to another, the purchaser acquired no more than a *jus ad rem*, which only became a real right when the timber had become moveable property by being cut down and separated from the ground. So long as it remained uncut it remained part of the entailed estate, and, apart from any express stipulations in the deed of entail, passed to the next heir with the estate at the death of the heir in possession, notwithstanding any personal contract of sale entered into by the latter,<sup>6</sup> and notwithstanding the provisions of the Sale of Goods Act, 1893.<sup>7</sup> It was to remedy this state of the law that s. 7 of the 1914 Act was passed. That section provides that where an heir in possession has entered into a contract for the sale of timber which he is entitled to sell, but where the timber or part of it has not been severed from the ground at the date of the seller's death, the sale shall nevertheless be valid and enforceable against the succeeding heirs of entail to the same extent as it would have been against the seller had he survived the severance. Provision is made for payment of the whole price where none of the timber has been cut at the date of the seller's death, or for the price of the uncut part, to the heir or heirs in possession at the date or dates of severance, and the succeeding heirs may compel the purchaser to consign in bank the whole price or part thereof as the case may be, or the purchaser may in his option find caution for payment thereof, before he begins or continues the severance of the timber.<sup>8</sup>

#### SECTION 7.—MISCELLANEOUS.

**521.** An amendment of ss. 47, 48, and 49 of the Rutherfurd Act is effected by s. 8 of the 1914 Act. The sections of the earlier Act dealt with

<sup>1</sup> Rankine, *Land-Ownership*, 4th ed., p. 716.

<sup>2</sup> *Gordon v. Rae*, 1883, 11 R. 67.

<sup>3</sup> *Ker v. Graham's Trs.*, 1827, 6 S. 73, 270.

<sup>4</sup> *Macqueen v. Tod*, 1899, 1 F. 1069, at p. 1075.

<sup>5</sup> *Johnston Browne (O.H.)*, 1920, 2 S.L.T. 327.

<sup>6</sup> *Paul v. Cuthbertson*, 1840, 2 D. 1286; *Morison v. A. & D. F. Lockhart*, 1912 S.C. 1017.

<sup>7</sup> 56 & 57 Vict. c. 71.

<sup>8</sup> See also paras. 452 and 494, *supra*.



deeds dated on or after 1st August 1848, and provided (s. 47) that where, under any future trust disposition or settlement or other deed of trust, land is in possession of any person of full age born after the date of the deed, he shall not be affected by prohibitions, conditions, restrictions, or limitations of entail, and shall be deemed to be a fee-simple proprietor, with a right to petition the Court for a decree declaring him to be a fee-simple proprietor, which, when recorded, shall have the operation and effect of a formal and valid disposition to him, but preserving the rights of all parties, such as the superior or parties holding securities on the estate independently of the trust disposition or settlement or other deed of trust (s. 47); that liferent interests may only be granted in favour of persons in existence at the date of the grant, and liferenters born after the date of the grant shall be deemed to be fee-simple proprietors, with a similar preservation of the rights of superiors and others as is contained in ss. 47, 48; and that in the case of leases, where any land is held on lease by a person of full age born after the date of such lease, he shall not be affected by any prohibitions, conditions, etc. which are of the nature of entail, or are intended to regulate the succession of such person, or to limit, restrict, or abridge his possession or enjoyment of the lands in favour of any future heir; reserving the right of the proprietor to enforce any prohibitions, etc. inserted for the *bona fide* purpose of protecting his just rights and interests, so far as such enforcement is necessary (s. 49). The effect of s. 8 of the 1914 Act is to extend the provisions of ss. 47, 48, and 49 of the Rutherford Act to deeds and writings dated prior to 1st August 1848, provided that in the application of the provisions respectively to such deeds and writings the date of such writings shall be deemed to be the date of passage of the 1914 Act, namely, 10th August 1914.

**522.** Sec. 9 of the 1914 Act enacts that s. 2 of the Accumulations Act, 1800<sup>1</sup> (which relates to provisions for payment of debts or for raising portions for children, and to directions touching the produce of timber or wood upon any lands or tenements, and provides that such provisions may be made and given as if the Act had not been passed), shall not apply to Scotland; but provides that the restrictions in the Accumulations Act shall take effect and be in force with respect to any provision or direction in operation at the passing of the 1914 Act, to which, but for the enactment of this section, the second section of the 1800 Act would continue to apply, as if the date of the execution of the deed or other writing in which such provisions or directions are contained had been the passing of the 1914 Act.

#### PART IV.—ENTAIL PROCEDURE.

##### SECTION 1.—DECLARATOR OF IRRITANCY AND REDUCTION.

**523.** The procedure in an action of declarator of irritancy,<sup>2</sup> or in an action of reduction,<sup>3</sup> of a deed constituting an act of contravention,

<sup>1</sup> 39 & 40 Geo. III. c. 98.

<sup>2</sup> Juridical Styles, iii. 68.

<sup>3</sup> *Ibid.*, 84.

which are the appropriate actions competent to an heir-substitute against an heir in possession for enforcing the conditions and provisions of the deed<sup>1</sup> or testing its validity,<sup>2</sup> is the same as in ordinary actions of declarator or reduction. The declarator generally proceeds on the ground that the heir has by an act of contravention forfeited the estate;<sup>3</sup> but apparently it is competent in such an action to raise the question as to what the heir's powers really are, in view of an anticipated contravention.<sup>4</sup> The actions of declarator and reduction may be laid together or separately, but the decree of irritancy must be obtained before insisting on the reduction.<sup>5</sup> They may be raised by any substitute, however remote,<sup>6</sup> but the declarator of irritancy must be raised before the death of the contravener.<sup>7</sup> The decree does not affect onerous and valid deeds granted before the execution of the summons (1848, s. 40). It is competent to purge an irritancy at any time prior to the decree, whether the contravention is of one of the conditions contained in the Statute of 1685 or in the deed of entail.<sup>8</sup> The action of reduction may be defended by a third party who has derived right from the heir in possession, even if the heir himself does not appear to defend<sup>5</sup> and is excluded by the negative prescription.<sup>9</sup> It is a question whether a contravention of an entail could be challenged after the entail has been brought to an end, and more particularly if the challenge be at the instance of one who has never been a substitute heir of entail.<sup>9</sup>

## SECTION 2.—PETITION TO RECORD DEED OF ENTAIL.

**524.** The petition to record a deed of entail has been treated above.<sup>10</sup> The petition is presented to the Junior Lord Ordinary; and where it is presented by the maker, institute, or heir in possession, no intimation is necessary, otherwise intimation is made on the institute.<sup>11</sup>

## SECTION 3.—APPLICATIONS UNDER ENTAIL ACTS TO COURT OF SESSION.

### SUBSECTION (1).—*Form of Petition.*

**525.** The procedure in petitions for authority to exercise a power under the Entail Acts has, to a certain extent, been already dealt with, particularly in discussing the power to disentail; and most of the recent decisions on such questions as the value of an heir-substitute's

<sup>1</sup> *Earl of Breadalbane v. Jamieson*, 1877, 4 R. 667, 672.

<sup>2</sup> *Fairlie's Trs. v. Fairlie*, 1860, 22 D. 632.

<sup>3</sup> *Bontine v. Graham*, 1837, 15 S. 711.

<sup>4</sup> *Murray v. Lord Elibank*, 1829, 7 S. 641.

<sup>5</sup> *Bontine v. Dunlop*, 1823, 2 S. 106.

<sup>6</sup> *Dundas v. Murray*, 1774, Mor. 15430.

<sup>7</sup> *Maxwell v. Maxwell*, 1846, 5 Bell's App. 165.

<sup>8</sup> *Abernethie v. Gordon*, 1837, 15 S. 1167; 1840, 1 Rob. App. 434, at p. 471; *Somervell v. Somervell* (O.H.), 1901, 9 S.L.T. 344; see also *Stewart v. Nicolson*, 1859, 22 D. 72.

<sup>9</sup> *M'Adam v. Cathcart*, 1909, 1 S.L.T. 512

<sup>10</sup> See para. 468, *supra*.

<sup>11</sup> *Napier*, 1762; Shand, Practice, p. 1020, note 1; Maclaren on Bill Chamber Practice, pp. 145–147.

expectancy, the security to be given for debts affecting the estate, the effect of the deed of disentail when granted, etc., will be found quoted there.<sup>1</sup> Any petition for authority to exercise a statutory power may be presented to the Junior Lord Ordinary, or to the Lord Ordinary officiating on the Bills (1875, s. 12 (1)), unless the power to be exercised is derived from some Act other than the Entail Acts which prescribes a different procedure.<sup>2</sup>

**526.** The procedure in entail petitions presented to the Court of Session is mainly regulated by the 12th section of the Act of 1875, the Distribution of Business Act, 1857,<sup>3</sup> and, as regards disentail petitions, the Codifying Act of Sederunt.<sup>4</sup> The petition itself should contain a reference to the titles of the petitioner and the sections of the Entail Acts conferring the powers which the petitioner desires to exercise (these sections are usually quoted at length, but a reference to them may be sufficient), a statement of the circumstances under which the petitioner desires the authority craved, with a reference to the schedule of debts affecting the estate, and the names and designations of the next three heirs. After referring to the sections of the Entail Acts regulating the procedure, the petition closes with the prayer to the Lord Ordinary to grant the power craved.<sup>5</sup>

#### SUBSECTION (2).—*Curators.*

**527.** Any petition, except for power to disentail, may be presented by the tutor, curator, or guardian of anyone under legal incapacity from age or otherwise (1875, s. 12 (2); 1882, s. 11); and where the consent of any heir of entail is required, and he is incapable of giving such consent from legal disability, the Lord Ordinary may appoint one of his ordinary guardians, or any other person, to act as his *curator ad litem*; and such curator may competently consent, for his ward, to the prayer of the petition being granted (1882, s. 12), and no action will lie against him for failure in the performance of his office unless it be averred that he acted corruptly.<sup>6</sup> The appointment of a curator is usually made after intimation and service, and the expiry of the *induciæ*.<sup>7</sup>

#### SUBSECTION (3).—*Intimation and Service.*

**528.** The Lord Ordinary may order advertisement to be made in the minute books and on the walls in common form, and also in the *Edinburgh Gazette* and some other newspaper circulated in the county wherein the lands are situated, the name by which the lands are commonly known being sufficient description, and such service as he thinks proper, the *induciæ* of which may be the same as upon summonses in terms of the Court of Session Act, 1868, s. 14, *i.e.* seven days where

<sup>1</sup> See paras. 479 *et seq.*, *supra*.

<sup>3</sup> 20 & 21 Vict. c. 56, ss. 4-6.

<sup>5</sup> See Juridical Styles, iii. 477-531.

<sup>7</sup> See *Somervell's Tr.*, 1901, 9 S.L.T. 35.

<sup>2</sup> *Shaw Stewart* (O.H.), 1905, 13 S.L.T. 39.

<sup>4</sup> C.A.S. C, v.

<sup>6</sup> *Maxwell Heron v. Dunlop*, 1893, 21 R. 230.



the party on whom service is to be made is within Scotland, and fourteen days where he is furth thereof (1875, s. 12 (4)). As a matter of correct practice, service is generally ordered on the next three heirs of entail,<sup>1</sup> or on all if less than three exist, but it is only necessary that the petition should be served on the heirs of entail whose consent may be required.<sup>2</sup>

**529.** A petition for sale of an entailed estate and its conversion into entailed money remains a depending process for all purposes until the entail comes to an end (1882, s. 23 (5)). Incidental motions in such petitions as, *e.g.* applications for warrant to uplift and apply part of the price of the entailed estate, are made by way of Notes in the process. In the case of such Notes, which have been described as "a merely incidental step in the original application to sell the entailed estate," the practice has not been uniform as to intimation, but in a recent case public intimation was dispensed with and intimation was only made to the parties who were interested and mentioned in the prayer of the Note.<sup>3</sup> By the Codifying Act of Sederunt (C, v. 1 (b)) provision is made, in the case of disentail petitions, for edictal service and intimation upon an heir who is furth of Scotland; it is further provided that intimation shall be made to his agent in Scotland, if he has one, and that a certificate shall be produced, signed by the petitioner's agent, stating either that such intimation has been made, or that the party has no known agent in Scotland. As a general rule a certificate in terms of the C.A.S. must be lodged, but in special circumstances it will be dispensed with.<sup>4</sup> Where a trustee in a sequestration applies for disentail, intimation to the next heirs cannot be validly given till three months after the application, and a *curator ad litem* will not be appointed before then.<sup>5</sup>

**530.** Answers may be lodged by any heir whose consent is necessary, by creditors of heirs-apparent who have borrowed on the security of their right of succession subsequent to 1st August 1848 (1848, s. 10; 1882, s. 13), but not by creditors of other heirs unless the debt was contracted before 1st August 1848 (1848, s. 9), nor by personal creditors of any heir.<sup>6</sup> On sufficient security being given to a creditor for his debt, his opposition will be disallowed.<sup>7</sup> The Lord Ordinary has, however, a discretionary power to allow any person to appear for his interest.

#### SUBSECTION (4).—*Schedule of Debts.*

**531.** The petitioner must produce an affidavit (1848, s. 6), or, in lieu thereof, a schedule (1875, s. 12 (5)), signed by himself and deponed to by him as correct, setting forth the full amount of all debts or provisions

<sup>1</sup> *Rackstraw v. Douglas*, 1917 S.C. 284, per Lord Dundas at p. 293; *Duke of Portland* (O.H.), 1893, 1 S.L.T. 144; *Stuart* (O.H.), 1906, 14 S.L.T. 563.

<sup>2</sup> 1848, s. 36; *Davys*, 1870, 9 M. 44.

<sup>3</sup> *Lockhart* (O.H.), 1922, S.L.T. 556.

<sup>4</sup> *Younger* (O.H.), 1918, 1 S.L.T. 84.

<sup>5</sup> *Lord Napier and Ettrick's Tr. v. Napier*, 1901, 3 F. 579; *Somervell's Tr.*, 1901, 9 S.L.T. 35; Act 1882, s. 18.

<sup>6</sup> *Buchan Hepburn v. Davis*, 1868, 6 M. 1094.

<sup>7</sup> *Buchan Hepburn v. Justice*, 1868, 6 M. 929.

that may be made to affect the fee of the estate which are not secured by having been placed on record, and the names of the parties in right to the same. By the Act of 1853 (s. 1) it is provided (see *infra*) that interlocutors are not to be questionable for want of compliance with the provisions of the Acts as to the making and producing of affidavits, and it is further provided (s. 17) that an affidavit shall be sufficient if it is stated to be to the best of the knowledge and belief of the maker. Where the heir of entail presenting the application is absent abroad and has appointed commissioners to act on his behalf, the commissioners will be entitled to make the affidavit if the Court is satisfied that they have the petitioner's full authority.<sup>1</sup>

#### SUBSECTION (5).—*Consents.*

**532.** The consent of any heir of entail to the granting of the prayer of the petition must be in writing, and is irrevocable (1848, s. 50), though it may be reduced on the ground of fraud or essential error.<sup>2</sup> Consents may be competently given at any time in the course of the proceedings (1875, s. 5 (1); 1875, s. 6; 1882, s. 13). Where they are given, the Lord Ordinary, on being satisfied that the procedure has been regular and proper, will pronounce an interlocutor giving effect to the terms of the consents. Where consents are refused, this must be stated either in the petition or by minute, and the Lord Ordinary can have the value in money of the expectancy of the heir ascertained; and on the said value being ascertained, and not before,<sup>3</sup> and paid into bank, or on proper security being given therefor over the entailed estate, he may dispense with the consent (1875, s. 5 (1); 1875, s. 6; 1882, s. 13). The considerations to be taken into account in valuing consents have been already discussed.<sup>4</sup>

#### SUBSECTION (6).—*Remits to Men of Business and of Skill.*

**533.** The Lord Ordinary may order any further procedure which he thinks proper, including investigation into the circumstances by professional persons, or persons of science and skill.<sup>5</sup> As a matter of practice, after the *induciae* have expired, the Lord Ordinary in all cases remits to a man of business to report whether the procedure has been regular and proper and in conformity with the Entail Acts and relative Acts of Sederunt. Where the application raises questions as to the value of lands or of improvements, or of the value of the interests of heirs of entail, he will also remit to one or more men of skill, or to an actuary, to report. Such questions as the amount of feu-duty to be charged, and the terms of the feu-charter, are also proper subjects

<sup>1</sup> *Lord Stonehaven* (O.H.), 1926, S.L.T. 64.

<sup>2</sup> *Menzies v. Menzies*, 1893, 20 R. (H.L.) 108.

<sup>3</sup> *Baird v. Baird*, 1891, 18 R. 1184.

<sup>4</sup> See paras. 479 *et seq.*, *supra*.

<sup>5</sup> Distribution of Business Act, 1857 (20 & 21 Vict. c. 56), ss. 4 and 5.

of a remit; and the final interlocutor will be framed in terms of such reports. It is against principle that as matter of right the land agents of the next heir should go over the estate with the man of skill or send him documents or make separate representations to him regarding the value of the estate.<sup>1</sup>

SUBSECTION (7).—*Reclaiming and Appeals.*

**534.** Any interlocutor on the merits pronounced by the Lord Ordinary, if not reclaimed against within eight days, becomes final.<sup>2</sup> The reclaiming days on an interlocutor signed in vacation by the Junior Lord Ordinary are ruled by s. 94 of the Court of Session Act, 1868,<sup>3</sup> but it is doubtful whether this section applies to interlocutors signed by the Lord Ordinary on the Bills.<sup>4</sup> An appeal may be taken from the Inner House to the House of Lords; but all deeds granted at the sight of the Court are irrevocable and not reducible on any ground of irregularity or non-compliance with the provisions of the Act, unless so appealed against or challenged, by declarator or otherwise, within the time that such appeal is competent.<sup>5</sup> They may be reduced at any time on the ground of fraud or essential error;<sup>6</sup> but no interlocutor, judgment, or decree following on any petition is at any time reducible on the ground of want of compliance with the Entail Acts or any Acts of Sederunt, in so far as regards the matter set forth in the petition, the intimation, service and advertisement thereof, the calling of parties thereto, the contents and productions of the affidavit, and, generally, the procedure therein; provided no injury have been suffered by any person, that the necessary consents have been obtained, that the petition has been served on any party expressly required by any Act to be called, and that the decree does not go beyond what was concluded for in the application (1853, s. 1).

SUBSECTION (8).—*Amendment of Petition.*

**535.** A petition may be amended at any time, subject to such direction as the Lord Ordinary may think proper as to further intimation and service (1853, s. 3).

SUBSECTION (9).—*Death of Petitioner.*

**536.** Should an applicant die, his personal representative, or his successor in the entailed estate, or his donee, legatee, or assignee, may

<sup>1</sup> *A. B. (O.H.)*, 1916, 1 S.L.T. 41.

<sup>2</sup> 20 & 21 Vict. c. 56, ss. 5 and 6; *Marquis of Queensberry's Trs. v. Douglas*, 1907 S.C. 924.

<sup>3</sup> *Grant Suttie's Tutors v. Viscountess Dalrymple*, 1883, 11 R. 3.

<sup>4</sup> See Lord Shand's opinion in *Grant Suttie*, *supra*.

<sup>5</sup> 1853, s. 24; 1882, s. 29; and see *Viscount Fincastle v. Earl of Dunmore*, 1876, 3 R. 345.

<sup>6</sup> *Menzies*, *supra*.



be sisted, and prosecute the application, if they have otherwise right and interest to insist in the application.<sup>1</sup> The right to be sisted does not extend to disponees of an heir of entail who has granted a disposition of the estate and presented a petition for authority to sell, but has died before the authority is granted, for the disponees have no right and interest (1875, s. 12 (3)) in the estate but merely a right against the representatives of the deceased heir.<sup>2</sup>

SUBSECTION (10).—*Disappearance of Heir in Possession.*

**537.** Where an heir in possession has disappeared for seven years and cannot be found, the next heir may make affidavit to that effect, and petition the Court to appoint a factor *loco absentis*, who may obtain authority from the Court to disentail or sell the estate. The balance of the price, after satisfying the expectancies of any heirs whose consents may be required, will be paid into bank, or invested for behoof of the absent heir, and is then held to be moveable estate, subject to the provisions of the Presumption of Life (Scotland) Act, 1891.<sup>3</sup> Where the heir in possession has disappeared for a shorter period than seven years, and a factor *loco absentis* has been appointed, he has the same powers as the heir himself to feu, lease, borrow, or charge for improvement expenditure.<sup>4</sup>

SUBSECTION (11).—*Expenses.*

**538.** It is competent in any application to decern for payment of expenses against any of the parties, or out of the entailed estate or consigned money. Even if successful, a petitioner may be refused his expenses against opposing heirs, unless their opposition is unreasonable;<sup>5</sup> while he will be liable for all expense properly incurred by a *curator ad litem* to a minor heir.<sup>6</sup> In special circumstances unsuccessful respondents may be held entitled to their expenses out of the proceeds of the sale of an entailed estate.<sup>7</sup> The expenses of a note by an executor of a deceased petitioner in a depending petition for authority to sell (1882, s. 23 (5)), have been held to form part of the expenses of the petition.<sup>8</sup> For the expenses of a petition to uplift consigned money in terms of the Lands Clauses Consolidation Act, ss. 79–81, see **COMPULSORY PURCHASE.**<sup>9</sup>

<sup>1</sup> *Maxwell*, 1877, 4 R. 1112, except where consents are required to the application (1875, s. 12 (3)); and see *Robertson*, 1864, 2 M. 1178.

<sup>2</sup> *Macdonald*, 1928 S.C. 346.

<sup>3</sup> 54 & 55 Vict. c. 29.

<sup>4</sup> 1882, s. 14, amended by the Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. c. 29, s. 8).

<sup>5</sup> *M'Donald v. M'Donalds*, 1879, 6 R. 1011; 1880, 7 R. (H.L.) 41; *Pringle v. Pringle*, 1892, 19 R. 926.

<sup>6</sup> *Johnstone*, 1885, 12 R. 468.

<sup>7</sup> *Hope Vere* (O.H.), 1921, 2 S.L.T. 271.

<sup>8</sup> *Bedell-Sivright's Curator Bonis* (O.H.), 1924, S.L.T. 17.

<sup>9</sup> Vol. IV. p. 261, *ante*.

SECTION 4.—APPLICATIONS UNDER THE ENTAIL ACTS IN THE  
SHERIFF COURTS.

SUBSECTION (1).—*For Power to grant Feus and Dispositions  
for Building Purposes.*

539. These powers, which are conferred by the Entail Amendment Act, 1868,<sup>1</sup> override any prohibition or limitation which may be contained in the deed of entail or in any Act of Parliament (s. 3), and are irrespective of the purposes for which the proposed buildings may be intended. There is no power under the Act to deal with minerals or the right of working them; and gardens, orchards, policies, or enclosures in connection with, and in so far as necessary to the amenity of, the manor place, are expressly excluded from the scope of the Act (s. 3). Subject to these exceptions, an heir of entail in possession may apply to the Sheriff for power to grant building feus, and, but only where the estate is held on burgage tenure, dispositions subject to a ground-annual, of any part of the entailed estate (s. 3). The application is to the Sheriff of the county in which the subjects are situated (s. 4). It would appear that the application can only be made by an heir of entail in possession who is *capax* and of full age, as the provisions of the Acts (1875, s. 12; 1882, s. 11), which permit guardians for heirs under disability to present petitions, appear only to apply to petitions presented to the Court of Session. No form of application is specified, but it is most conveniently made in the form given by the Sheriff Courts (Scotland) Act of 1876,<sup>2</sup> and should specify the lands, the next heir, the conditions, and the annual payment on which it is proposed to feu or dispone. The proposed payment, whether feu-duty or ground-annual, must represent the whole consideration given, and any grassum, fine, or valuable consideration other than these will render the charter or disposition null and void (1868, s. 3).

540. On the application being made, the Sheriff directs notice, in such manner as he thinks proper, to be given to the next heir of entail only (if under age or subject to any legal incapacity, the Sheriff appoints a tutor or *curator ad litem*), and remits to one or more skilled men to report whether the subjects fall within the exceptions already mentioned or not, and as to their value. If the report is to the effect that the subjects are proper for the purpose, and that the proposed consideration is adequate, the Sheriff grants authority (which is available to any succeeding heir of entail)<sup>3</sup> at any time within ten years to feu or dispone accordingly, for such consideration, not being less than the rate fixed by the skilled reporters, as is obtainable, subject to such conditions as the Sheriff may think essential or fit (s. 4); but no longer subject to the nominal tax of one penny in lieu of casualties of entry.<sup>4</sup>

<sup>1</sup> 31 & 32 Vict. c. 84.

<sup>3</sup> 45 & 46 Vict. c. 53, s. 6 (3).

<sup>2</sup> 39 & 40 Vict. c. 70.

<sup>4</sup> 37 & 38 Vict. c. 94, s. 23.

**541.** The decree is authority to the heir of entail to grant the necessary feu-charter or disposition, which, being recorded in the Register of Sasines, becomes effectual to all intents and purposes (s. 4). The feu-charter or disposition must contain a stipulation that buildings of at least double the value of the annual payment<sup>1</sup> shall thereafter<sup>2</sup> within the next five years be erected on the lands feued or disposed, and kept in good tenantable and sufficient repair (s. 5). The only mode of reviewing the Sheriff's decree is by note of appeal to the Court of Session (which must be taken, and written notice thereof given to the opposite party, within six months, otherwise the decree becomes final), where it is disposed of as a summary cause. The decision of the Court of Session is final (s. 4), and no appeal to the House of Lords is provided for.

**542.** Under the Entail (Scotland) Act, 1914,<sup>3</sup> very wide powers of granting feus are conferred upon heirs of entail in possession (s. 4), but it is provided that no feus shall be granted without the consent of the nearest heir of lawful age and subject to no legal incapacity, who must sign the feu-contract or other deed; if he refuses his consent or if he is not of lawful age or is subject to any legal incapacity, provision is made (s. 4 (a)) for a finding by the Sheriff of the county in which the lands to be feued are situated, upon the application of the heir in possession, to the effect that the granting of the feu is in accordance with the provisions of the section and that the feu-duty is fair and reasonable.

#### SUBSECTION (2).—*Under the Acts of 1840 and 1882.*

**543.** In addition to the general powers given by the Act of 1868, special powers for feuing churches, burying-grounds, schools, playgrounds, and ministers' and schoolmasters' houses and gardens are given by the Act of 1840,<sup>4</sup> and for scientific or other purposes of public utility by the Act of 1882,<sup>5</sup> the procedure in both cases being that of the Act of 1868.

#### SUBSECTION (3).—*For Power to grant Leases.*

**544.** In addition to the right of an heir of entail, on his own authority, to lease lands for a period not exceeding twenty-one, and minerals for not more than thirty-one, years, a general power is given him by the Entail Act of 1882,<sup>6</sup> to make in the Sheriff Court any application as to leases longer than these, competent by any of the Entail Acts, in the same manner and on the same terms and conditions as an application under the Act of 1868. Applications for power to lease under the Montgomery Act<sup>7</sup> and the Rutherford Act<sup>8</sup> are therefore competent.

<sup>1</sup> See *M'Lagan*, 1896, 34 S.L.R. 18.

<sup>3</sup> 4 & 5 Geo. V. c. 43.

<sup>5</sup> 45 & 46 Vict. c. 53, s. 6 (2).

<sup>7</sup> 10 Geo. III. c. 51, ss. 4 and 5.

<sup>2</sup> *Stewart v. Murdoch*, 1882, 9 R. 458.

<sup>4</sup> 3 & 4 Vict. c. 48, s. 1.

<sup>6</sup> *Ibid.*, s. 5.

<sup>8</sup> 11 & 12 Vict. c. 36.



The provisions of the Act of 1868 extend to leases of ninety-nine years, and those of the Acts of 1840 and 1882 also include leases.

SUBSECTION (4).—*For Power to Exchang.*

See EXCAMBION.<sup>1</sup>

SUBSECTION (5).—*For Power to charge Improvements.*

**545.** Applications for power to borrow and charge for improvements under the Entail Acts of 1875 and 1878 are competent by the Entail Act of 1882 (in the case of all entails), and are made as nearly as may be like applications under the Act of 1868 (1882 Act, ss. 4, 5, 6; 1875 Act, ss. 7, 8; 1878 Act, ss. 3, 4). The application may be made in two sets of circumstances: (1) where the improvements have already been made; and (2) where they are in course of construction, or in contemplation. Where they have already been made, the Sheriff must satisfy himself, by such evidence as he thinks reasonable, that they are substantial and of at least the value of the sum sought to be borrowed, and that this sum represents the cost of them; vouchers need not be produced, but the Court, or anyone to whom the matter has been remitted by the Court, may order production of them; and the granting of the application ends the process. When in course of construction or contemplated, the Sheriff must be satisfied that they will be substantial and of probable benefit to the estate, and the cost, which is the amount to which authority to borrow will be granted, is fixed by estimate of one or more persons of skill. The lender consigns the money in bank under orders of the Court, which makes such orders as it thinks necessary from time to time for the inspection and proper carrying out of the improvements, and, on motion made, for payment to the applicant, out of the consigned money, of such sums as he may have paid or be liable for, for the improvements; and the process subsists till the whole sum has been so paid away (1875 Act, s. 7). In fixing the amount to be borrowed, the cost of the application, and of obtaining the loan and granting security therefor, must in all cases be added to the estimated cost of the improvements (*ibid.*).

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## ENTERTAINMENT.

See CHILDREN AND YOUNG PERSONS; THEATRES  
AND PLACES OF AMUSEMENT.

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<sup>1</sup> Page 436, *infra*.

## ENTERTAINMENT DUTY.

*See* EXCISE; THEATRES AND PLACES OF AMUSEMENT.

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## ENTRY WITH SUPERIOR.

*See* CHARTER (FEUDAL); COMPLETION OF TITLE.

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## ENUMERATIO UNIUS EST EXCLUSIO ALTERIUS.

*See* MAXIMS; STATUTE LAW.

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## EODEM MODO QUO QUID CONSTITUITUR EODEM MODO DISSOLVITUR.

*See* EVIDENCE; MAXIMS.

## EPIDEMIC.

*See* PUBLIC HEALTH.

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## EPISCOPAL CHURCH IN SCOTLAND.

*See* CHURCH.

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## EQUALISING DIVIDEND.

*See* SEQUESTRATION.

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## EQUITABLE COMPENSATION.

*See* ELECTION, OR APPROBATE AND REPROBATE.



# EQUITY.

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### SECTION I.—DIFFERENT MEANINGS OF EQUITY AS A LEGAL TERM.

**546.** Equity, as a legal term, has three meanings that require to be distinguished. It means (1) the principle, spirit, or reason which underlies the whole law, its general rules or particular decisions. Thus we speak of law as declaratory of equity, the equity of a statute or the equity of the case. So Blackstone says: "Equity is the soul and spirit of all law: positive law is construed by it, and rational law is made by it. In this sense, equity is synonymous with justice." It means (2) that part of the law or jurisprudence of a State which supplies the omissions or corrects the excesses of pre-existing law, whether in the form of codes, statutes, customs, the writings of jurists recognised as authorities, or the decisions of judges; for all these may and do err. In this sense, we speak of the equity introduced by the *Jus Honorarium* or Prætorian Law of Rome, as distinguished from the *Jus Civile*, and of the equity of the Court of Chancery as distinguished from the common

GENERAL AUTHORITIES.—Austin, Lectures on Jurisprudence, ii. 250, 273, 282, 312; Maine, Ancient Law, chap. 3; Holland, Elements of Jurisprudence, 8th ed., 63; Lorimer, Institutes of Law, 2nd ed., Introduction.

*Roman*.—Corpus Juris Civilis, *passim*; Muirhead, Roman Law, 247 and 257; Salkowski, Roman Law, 12; Bryan Walker, Fragments of the Perpetual Edict of Julianus; Otto Lenel, Das Edictum Perpetuum.

*English*.—Lord Bacon, Maxims; Blackstone, Com. i. 61, 91; iii. 426; Spence, Equitable Jurisdiction of the Court of Chancery; Story, Equity Jurisprudence; Snell, Principles of Equity; Campbell, Lives of the Chancellors.

*Scottish*.—Stair, Institutions, iv. 3; Kames, Principles of Equity; Mackay, Practice, i. 208–211; Maclaren, Court of Session Practice, 100; Dove Wilson, Sheriff Court Practice, 46.

law of England. These two meanings are contradictory, for in the former law is equity, and in the latter equity is opposed to law, as where Cicero says of Galba, that he was wont "*Multa pro æquitate contra jus dicere.*"<sup>1</sup> It means (3) that part of the law or the decision of a case which is left to the discretion of judges or arbiters, either by express provision of the law or without such provision. The points so left to discretion may be questions of fact only, in which case the judges or arbiters act as a jury, but often they may be also mixed questions of law and fact, or even, when a reference is made to a lawyer, questions of pure law or legal procedure. In this sense we speak of the *arbitrium boni viri* and the equitable discretion of a judge or arbiter.

**547.** In the first and third of these senses no system of jurisprudence which aims at justice can ignore equity, for in the first equity means reason, and in the third it means discretion, two of the essential qualities of the judicial mind and of just judgments. In the second sense, in which equity constitutes a distinct province or branch of the law, there may not be in some states or at some times so distinct a separation of law and equity as existed in Rome during the period of the Prætorian Office and the epoch of the Classical Jurists, and left its mark in the Digest even after Justinian, completing the work of earlier emperors, had fused law and equity, or as obtained in England during the period when the Chancellor and his Court exercised a separate jurisdiction. Austin, following other writers,<sup>2</sup> contends that in this sense equity was confined to Rome and England. But it will be found that even in countries where no such separate system of equity or of equitable jurisdiction has ever existed, as on the Continent and in Scotland, which in this matter has followed France and not England, a similar, though in some directions less extensive, equitable power has been exercised in Courts which administer both law and equity.

**548.** No better general definition of equity has been given than that of Aristotle in his *Ethics*, v. 10, which Grotius adopted,<sup>3</sup> "The rectification of legal justice when it falls short on account of its generality" (*ἐπανορθωμα νομιμον δικαιον ἢ ἐλλείπε δια το καθολου*); and no fuller description than in his *Rhetoric*, i. xiii.: "It is equity to pardon human failings, and to look to the law-giver and not to the law; to the spirit and not to the letter; to the intention and not to the action; to the whole and not to the part; to the character of the actor in the long run, and not to the present moment . . . lastly, to prefer arbitration to judgment, for the arbitrator sees what is equitable but the judge only the law, and for this an arbitrator was first appointed in order that equity might flourish." Aristotle regarded equity (*ἐπιείκεια*) from the side of morals, and includes in his description things which a lawyer or jurist would not include. Equity, however, is an ethical idea, and implies the

<sup>1</sup> De Oratore, i. 57.

<sup>2</sup> Cf. Meyer in his *Esprit des Institutions Judiciaire*, La Haye, 1819.

<sup>3</sup> De Æquitate, i. s. 2.

correction of law, not only where it has erred by the ignorance or inadvertence of the lawmaker, or through alteration of circumstances, but also where it has become antiquated and repugnant to the conscience of a later age. How far in this last case the correction can be effectually made by a magistrate such as a Prætor, or by a judge such as the Chancellor, or whether it can only be made by legislation of the supreme power, is a question which has been answered differently in different countries, and in the same country at different times, or even at the same time, with reference to different cases.

**549.** Equity in the first sense, meaning (1) the principle or reason of the law, is theoretical, and concerns more the science of jurisprudence than the practice of the law, though it is sometimes appealed to in practice, as in the instances referred to of an appeal to the equity of a statute or a law case. The English terms equity of redemption in mortgages, and equity to a settlement in favour of a married woman, are instances, however, in which equity in this sense has been applied to a special doctrine of the law introduced by the Chancery Courts. The other two senses, in which equity means (2) the correction of the law according to a moral standard, and (3) the discretion of a Court judge or arbiter, are of practical importance in every Court, and one or two general remarks may be made on them before treating, as is proposed, briefly—I. Roman Equity; II. English Equity; and, somewhat more fully, III. Equity in the Law of Scotland.

**550.** Roman Equity and English Equity are subjects much too large for the present article, and may appear beyond its scope, but some account of them is necessary, because the equity administered by the Courts in Scotland has been materially affected both by the Roman and English systems. The imperfection of the law renders necessary the equity which is required to correct its omissions, errors, or excesses. If the law were perfect there would be no need of equity, and so it has been said there is no equity in relation to God because the divine law is perfect. Human law is always imperfect, and a certain amount of equity will always be necessary both for its interpretation and application if the *summum jus* is not to become *summa injuria*. To what extent equity will be allowed to operate depends on the customs of different countries and the practice of different Courts. When no allowance is made for equitable considerations, Courts of justice become Courts of injustice. On the other hand, if equity is allowed too wide an operation, according to the view of individual judges without reference to any rules or precedents, it is apt to become arbitrary, uncertain, and as inequitable as the defective law itself. When discretion becomes caprice, it is not equity. It is in this view of it that Bacon said: "The best law is that which leaves least to the discretion of the judge, and the best judge is he who leaves least to his own discretion"; and that Selden made his jest that the measure of law had become the measure of the Chancellor's foot. But the best equity will endeavour to avoid both extremes—on the one hand, the rigid application of the law so as to do injustice; and



on the other, acting only upon the individual opinion, which is apt to become the caprice, of the judge.

**551.** The equity which remits to the discretion of the judge or arbiter particular circumstances and special cases, or, as often happens, parts of cases, is a kind of equity which cannot be dispensed with in the determination of many disputes arising in the practical conduct of business. All arbitration proceedings are examples of the use of this kind of equity. The arbiter is bound to use his discretion, and to decide according to what he considers fair, untrammelled by rules of law. If he does not go beyond the matter submitted to him, and does not violate essential justice in his procedure, *e.g.* by hearing one party and not the other, his judgment is not challengeable in any Court. The preamble of a decree-arbitral in the Scottish form, by which the arbiter states that he has "God and a good conscience before his eyes" in giving his decision, is an appeal to equity and its ultimate sources.

## SECTION 2.—ROMAN EQUITY.

### SUBSECTION (1).—*In General.*

**552.** The word equity in Latin, *æquitas*, is derived by modern philologists not from the Greek *εἰκος* meaning reasonable, as it was by Grotius<sup>1</sup> and others, but from a Sanscrit root *aiko* or *eka*, meaning one,<sup>2</sup> or another root, *ak*, meaning to resemble.<sup>3</sup> Its ultimate derivation, though it might throw light on the original use of the word, is too remote to be of importance in ascertaining the metaphorical or secondary meaning or meanings which became associated with it when used as a legal term. But it seems improbable that Austin was right in regarding this original legal sense of equity as "universal or general, as opposed to particular or partial law";<sup>4</sup> or Sir H. Maine as the levelling of the National Roman Law (*Jus Civile*) to make it agree with the Common Law of Nations; or Bracton and others, who identify it with *æqualitas*, in the sense of giving like decisions in like cases, although all these shades of meaning have become associated with it. The last, *æquitas est æqualitas*, has been treated as one of the maxims of English equity, but is too vague to be of practical use.

**553.** The ordinary use of the word by classical authors, as Cicero and Plautus, and by the jurists of the classical period, whose *dicta* are embodied in the Digest both in the adjective "*æquus*" and the noun "*æquitas*," implies what is fair and reasonable. It was not used by the jurists as equivalent to the law introduced by the prætors' edict, although that law affords one of the best examples of the equitable modification of strict law. The word *æquitas* is indeed of somewhat rare use in the Digest, and, in one of the principal passages where it is used, is applied, not to the Prætorian Law, but to the *Jus Civile*, or to law (*jus*) in general.

<sup>1</sup> De *Æquitate*, p. 2.

<sup>2</sup> Fick, *Vergleichendes Wörterbuch*.

<sup>3</sup> Corssen, *Aussprache*, p. 374; *Nachtläge*, p. 237.

<sup>4</sup> *Lectures*, ii. 272.

"*In omnibus quidem maxime tamen in jure æquitas spectanda sit.*"<sup>1</sup> So law is defined as "*Ars boni et æqui*" by Celsus,<sup>2</sup> and the phrase, "*Secundum bonum et æquum*," like the phrase, "*Arbitrium boni viri*," which are both of frequent occurrence, has no special reference to the prætor or his edict. It is not, of course, disputable that the edict was, for a considerable period, the principal source of Roman equity, but equity was not supposed to be confined to it, and was deemed a principle which ought to permeate the whole law.

554. The Roman jurists considered the Law of Nature (*Jus Naturale*) as distinct from the Prætorian Law. But it has been overlooked that they also recognised that the prætor might decide contrary to equity: "*Quod semper bonum et æquum est jus dicitur, ut est jus naturale . . . Quod omnibus aut pluribus in quaque civitate utile est ut est jus civile, nec minus jus recte appellatur in civitate nostra jus honorarium. Prætor quoque jus reddere dicitur etiam cum inique decernit relatione scilicet facta non ad id quod ita prætor fecit sed ad illud quod Prætores facere convenit.*"<sup>3</sup> The famous definition of the *Jus Honorarium* or Prætorian Law by Papinian, clearly indicates that the prætors in their edicts did not appeal directly, either to the Law of Nature or the Law of Nations, or to equity, as the jurists frequently did, but to public convenience or utility. "*Jus Prætorium est quod prætores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam.*" This no doubt refers to the object of their reforms; but if the object was utility, practice was as likely to suggest the method in many cases as either the *Jus Gentium* or *Jus Naturale*.

555. The question of the relation between *Jus Naturale*, *Jus Gentium*, and *Jus Prætorium* is one of the most controverted in the history of Roman law, and here only what appears the most probable solution is stated without entering into proof. All three modified or developed the older, stricter, and more literal *Jus Civile* by principles of reason or equity. But the *Jus Gentium* and *Jus Naturale* were theories appealed to and used by the jurists in their responses and the text-writers in their treatises, while the *Jus Prætorium* was introduced by the experience gained in the execution of the prætor's judicial office. The *Jus Gentium* corresponded to what we now call comparative jurisprudence, which, by a comparison of the law of different nations, arrives at what is essential, as distinct from the local and temporary elements in legal institutions; but it originated in Rome from the number of persons, foreigners, or not full citizens, whose rights *inter se*, or in relation to Romans, had to be adjudicated. Comparative jurisprudence is also more theoretical. The *Jus Naturale* answered to what is now commonly called jurisprudence, or the philosophy of law, and was admittedly drawn by the Roman jurists mainly, though not exclusively, from the philosophy of the Stoics. The

<sup>1</sup> D. l. 17, 90.

<sup>2</sup> Inst. i. 1, 1.

<sup>3</sup> Paulus in D. i. 1, 11; cf. Bracton, i. 4, 3, who adds: *Quandoque pro eo tantum quod competit ex sententia.*

*Jus Prætorium* resembled the modification of the law introduced by English Chancellors, who at first, chiefly by new writs or forms of procedure, and afterwards by new rules, enunciated in the decisions of particular cases, remedied what was felt in practice to be the grave inconvenience, and sometimes the serious injustice, of the rigid forms and rules of the common law.

SUBSECTION (2).—*The Equity introduced by the Prætor.*

**556.** The mode in which the edict of the prætor, and, to a small extent, of the curule ædiles, introduced equity deserves notice. It was almost entirely through procedure rules, published at the commencement of his year of office in the Album on the walls of his court in the Forum, which recognised the validity, on the ground of equity or convenience, of new forms of actions, new remedies, new defences, and new forms of judgment and execution. Yet the prætor was called *Viva Vox Juris Civilis*, just as English judges who, however much they alter, are always deemed to declare the law. The power of the prætor to declare the law by edict was so closely contemporaneous with the system of the *formula* which superseded the more strict *legis actiones*, that it may be deemed certain the two were closely connected. It was by the freer style of the *formula*, or issue for the trial of the case, which might be adapted to almost any set of facts, that many of the reforms of the prætor were effected.

**557.** Only fragments of the Edict have been preserved, but these have been very ingeniously reconstructed by various modern civilians, so that we have at least a skeleton of the Perpetual Edict, the greater part of which was embodied in Justinian's Digest. It consisted of four parts—

I. The procedure prior to the issue of the *formula* by which the defender was brought into Court, and preliminary proceedings of action determined. This was called the procedure *in jure*, which took place in the prætor's Court—*De Vocando in jus*.

II. The various actions and their corresponding *formula* which the prætor sanctioned for trial before the judex—*De Judiciis*.

III. The various forms of decrees and their effects—*De re Judicata*.

IV. What was called *De Auctoritatibus Prætoris*, the forms of process introduced by the prætor for the procedure in his own Court, and which constituted perhaps the most important part of the edict, being subdivided into—

(a) *De Interdictis*.

(b) *Exceptiones* (Defences).

(c) *Stipulationes Prætoris*, the rules as to consignment, caution or surety, which, in certain circumstances, the prætor required at the commencement or in the course of a suit.

An example may be taken from each of these divisions, which included subjects which might not be at first expected.

**558.** The first division included the title of "*In Integrum Restitutio*,"



by which the prætor restored a right that had been lost or destroyed in law but not in equity. He did so if the loss had been due to fear, fraud, innocent mistake (*justus error*), a change of status, necessary absence, or the infirmity of age. These were all cases for which the *Jus Civile* had no remedy, or no adequate remedy, as the damages it allowed did not restore the person injured to the same position he held before the injury. The bare statement of these names shows how much they depended on considerations of equity in the sense of fairness. The ground of "change of status" referred to specially Roman conditions, but all the other grounds are grounds of equitable relief recognised in English and Scots practice.

The second division included the whole system of *formulae*, and covers, therefore, nearly every branch of law. One of the most important sections was that which dealt with the various cases in which the prætor, although he could not give the full right of property, gave *bonorum possessio* to the class of persons he deemed entitled to it in equity, although not in strict law. It might be given even against the express provision of a testament. As this possession was afterwards protected by prætorian interdicts, and became full ownership after a short prescription of one or two years, the person he preferred had practically nearly all the advantages of a full owner. The *bonorum possessor* corresponded to the equitable owner, as distinguished from the legal owner, in English jurisprudence; and to the beneficiary, or person with the beneficial interest, as distinguished from the fiduciary or trustee, in Scots law.

Under the third division, *De re judicata*, the prætor introduced such important pieces of procedure, still known in Scots practice, as the *Actio Judicati*, or action upon a decree, which he enforced by doubling the sum due if denied; and the elements of the procedure which was converted by the *Lex Julia* in the reign of Augustus into the *Cessio Bonorum*, or voluntary and mitigated bankruptcy.

Under the fourth division the Interdict system is the best example by which, like the injunction of the English Chancery procedure, the Court intervened to prevent the completion of an injury when the civil law action had only been able to try the case after the injury was done, and therefore could give only the imperfect remedy of damages. The prætorian *formulae* also concluded for damages, but only alternatively, in the event of the property not being restored or the contract not fulfilled.

**559.** In all branches of the edict it thus appears that the prætor, either by himself or by the directions he gave to the judge or judges to whom he remitted the case for trial, intervened to supplement the existing legal remedies by others which were introduced upon grounds of equity. Sparing in the use of the word, he was active in producing the thing, and introducing it into practice. To him was due the recognition of natural as against agnatic relationship as a test of heirship; the transfer of all property by delivery without formalities; the protection of

equitable ownership; the defeat of manifold forms of fraud; the requirement of *bona fides* and the highest equity in contracts;<sup>1</sup> the recognition in some cases and to some effects of natural, as distinguished from legal, obligations; and many other equities, most of which have now become part of the common law throughout Europe, and have nowhere been more completely adopted than in Scotland, which, having little or no common law of its own, readily followed the rules its early clerical lawyers derived from the civil as well as from the canon law.

**560.** The resemblance of many parts of the edict to what came in England to be called equity caused the prætorian law of Rome to be deemed the chief source of Roman equity, but it must not be overlooked that the jurists were also active in the equitable development of the civil law. The three sources of equity in Roman law may perhaps be called the historical (*Jus Gentium*), the philosophical (*Jus Naturale*), and the practical (*Jus Prætorium*). The question of priority has difficulties of its own, into which it is not necessary to enter; but it appears probable that while they overlapped each other, the first modifying influence was the *Jus Gentium*, the second the Prætorian Edict, and the third the writings of the jurists, who appealed both to the *Jus Gentium* and the *Jus Naturale*, and commented on the prætorian edict. The edict of the prætor had the advantage that it embodied equity in a more distinct, because concrete, form, and was free from the controversies of the jurists which culminated in two sects or schools, the strict and orthodox Sabinians and the free, rationalising Proculians; but there is an unsettled controversy as to what was the precise tendency of the rival schools. The prætor too was (and herein he differed from the English chancellor) an official who had a distinct function to declare law *a priori* by his edict, and was thus able to introduce equity more directly than the later chancellors, who modified the law only by their decisions. The earlier chancellors, who built the foundation of the system of Chancery procedure by bills, discoveries, subpœnas, etc., more nearly resembled the prætors. It was singular that an officer who held office only for a year as the prætor did, should have such power, but a strong sense of continuity marked the Roman character and institutions. This led succeeding prætors to adopt the edicts of their predecessors, while adding their own improvements of the law, and made the edict in a measure what has often been desired by law reformers in this country, an annual revision of the law by the highest authority, until, in the reign of Hadrian and prætorship of Salvius Julianus, it became the *Edictum perpetuum*, unalterable by succeeding prætors.

#### SUBSECTION (3).—*The Equity introduced by the Emperors.*

**561.** The imperial authority soon grew too great for the prætor to develop the law by equity at his own hand. That work had now to be

<sup>1</sup> D. xvi. 3, 31.

continued by the responses of certain patented jurists (*Responsa prudentium ex auctoritate principis*), by commentaries of legal writers on the edict and other parts of the law, and by imperial legislation. But the freedom of the jurists was equally inconsistent with the absolutism of the later emperors. Two of the last and greatest jurists were executed—Papinian by Caracalla, Ulpian by the Prætorian Guards of Alexander Severus. The edicts and rescripts of the emperor ultimately superseded the jurists, as they had done the prætors. It came to be the explicit rule in the reign of Constantine: “*Inter æquitatem jusque interpositum interpretationem nobis solis et oportet et licet inspicere.*”<sup>1</sup> Whatever disadvantages this had from the constitutional side, it had the advantage that the emperor could introduce equity from the larger experience of the whole empire, and, after the conversion of Constantine, from the higher ethical standard of Christianity. It also became the law of the whole empire in a way the edicts of a subordinate official could not have done. The Code and Novells were the commencement or starting-point not merely of the civil but of the canon law of the Middle Ages; and the papal canon law during its earliest and best period continued the equitable development which had been begun by prætors, jurists, and emperors. The codification of Justinian was itself an application of equitable principles extracted from the whole previous history of Roman law by a later school of jurists, Tribonian and the other imperial lawyers of Constantinople, in order to modify strict law. If it had been intended that the law of the emperor was to be absolute, the Digest would not have been compiled. There would have been, instead, one authorised Code applicable to the whole empire, similar to, but more universal than, the Codes of modern times.

562. From this rapid survey, it appears that equity was not an occasional or accidental force modifying Roman law, but one constantly operating, though by different methods and with different degrees of effect, during the whole period of the growth of the Roman jurisprudence. It did not finish with the Roman Empire. Its results were handed down, in the Roman and the Barbarian Codes, to the new age. It continued to operate not only on the canon law but on the civil law of the different States which arose after the Roman Empire was dissolved. It would be interesting, but is here impossible, to trace its subsequent history during the Middle Ages (first) through the canon law, which in some branches, e.g. the law of the family relations, became a more direct source of modern equity than the Roman law; (second) through the renewal of the study of the Roman law by the Italian glossatores, whose maxim, “*Quicquid non agnoscit glossa non agnoscit curia,*” shows their influence on the mediæval Courts, and whose tendency was to modify the Roman law, so as to adapt it to the altered relations of mediæval Europe; (third) by their successors, the jurists of France in the sixteenth and seventeenth, of the Low Countries in the seventeenth and eighteenth, and of Germany

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<sup>1</sup> C. i. 14, 1, and i. 12, 3.



in the eighteenth and nineteenth centuries, whose discussions and commentaries had always relation to the equitable ideas of their times.

**563.** The effect of this continuous flow of juristic glosses and commentaries on the pre-existing system, which, however changed, still retained the name of Roman law, from the era of Gaius to that of Papinian, from that of Papinian to that of Justinian, from that of Justinian to that of Irnerius the Glossator, from that of Irnerius to that of Cujacius, from that of Cujacius to that of Voet in Holland, Pothier in France, and Savigny in Germany, to name only the greatest of the multitude of lawyers who devoted their lives to the study and teaching of the civil law of Rome, has been to show how its equitable principles may be used to purify and mould the form and substance both of mediæval and modern law, and the education of lawyers in all times and countries. It is also a warning that the best equity is not always the most recent. A very large part of Roman equity, and still more of Roman law, is now obsolete, and retains only antiquarian, or historical, interest, because it is unsuited to the circumstances of modern life and business. But there remains a portion which, either by its clear enunciation of principles of justice or by its skilful adaptation to the jural relations which exist in all civilised countries, and their consequences, suffices to correct some abuses and errors both of mediæval and modern law, and must even now be deemed one of the best guides to equity.

### SECTION 3.—EQUITY IN ENGLISH LAW.

#### SUBSECTION (1).—*Its History.*

**564.** In England neither the Roman civil nor the Roman canon law was openly accepted in any of the Courts, except the Admiralty and Ecclesiastical Courts. The question whether any survivals of Roman law from the time of the Roman occupation remained in local customs does not concern the present subject. It is certain that much Roman law, directly or indirectly, through the canon, passed into the English law in the writings of lawyers and the decisions of judges more or less acquainted with it, but who did not acknowledge until recently their obligations. This began as early as the age of Glanville, and has continued down to the present day. But the main course of English law and legal procedure was independent of Roman influence, and was the result chiefly of historical causes within England itself. These causes led to a separation of equity from law, and of the Courts of Equity from the Courts of Law, as distinct and more complete and lasting than the Roman similar separation, for it continued to be administered not only under the authority of a separate official, the Chancellor, but in a distinct court, the Court of Chancery, which investigated facts in a different way by its own officials, and not by jury, and determined cases on equitable principles and considerations, and not by the strict rules of law. The origin of English equity, its development, and even its present

position after its fusion with law, are so nearly parallel to similar stages in the history of Roman law that it has been thought by some that the English Chancellors borrowed more than they in fact did from that law; by others, that the development was the result of a strong resemblance between the Roman and English character; and by others, that the progress from a system of rigid forms suitable to an early state of society, but gradually modified and corrected by successive drafts of equity as society advances, is in some shape a necessary process in the history of law in all countries. The truth seems to be, that all these circumstances contributed to the formation of the English equity system, which rivalled in its importance the older common law. A very brief sketch of the elaborate system of English equity can only be given here.

**565.** While Saxon customs and institutions continued in the English local courts, the Norman law, after the Conquest, regulated not only feudal relations, and the land and succession to it, as bound up with these relations, but also the procedure in all cases which came before the Supreme Royal Courts of Common Law—the King's Bench, Exchequer, and Common Pleas. These Courts, though originally parts of the Curia Regis, became separate Courts. The reforms of the Angevin and Plantagenet kings led to this separation, as they did to the larger constitutional separation between the executive, administrative, and judicial functions of the Curia Regis, and became still more marked after a representative Parliament was introduced. In the reign of John, by the 4th Article of Magna Charta, which ordained that "*Communia placita non sequuntur curiam regis sed teneantur in aliquo certo loco,*" the Court of Common Pleas was settled at Westminster, though the Courts of Exchequer and King's Bench continued to follow the King for some time. This arrangement was found so convenient that, after the reign of Edward I., the Courts of King's Bench and Exchequer also held their principal sittings at Westminster. Although a provision was made in the *Articuli super Cartas*, 28 Edw. I. c. 5, that the justices of the King's Bench, as well as the Chancellor, should follow the person of the King, this does not seem to have been long observed. The practice of sending judges on circuit, however, continued, and still exists, for the trial of civil as well as of criminal cases; and the ordinary mode of trial, both at Westminster and on circuit, was by jury as to the disputed facts, and by the judge as to law, both of which were reduced, by a technical but highly skilful method of pleading, to simple, and if possible, single issues. This system, while admirably contrived for ordinary cases, was tied down at the commencement of its proceedings to certain specific and technical forms of writs of action, during its course to the technical pleading called special pleading, and at its conclusion to certain specific and technical forms of writs of execution. It did not allow the trial of new kinds of cases, although an attempt to deal with varied circumstances was made by the introduction of the action on the case in the 13th of Edward II., which answered to the *actio utilis* of the Roman law. For

extraordinary cases, and cases which were not recognised by the common-law judges, an appeal had to be made to the King and his Council. It was a natural course to refer such cases to the Chancellor, as one of the greatest officers of State and usually a clerical lawyer, and that officer retained such cases within his own cognisance partly because the common-law judges would not undertake to deal with writs couched in new forms with which they were not familiar, but chiefly, as time went on, because he deemed his own courts, officials, and methods of inquiry better qualified for such suits.

**566.** Edward I. commenced the practice of sending petitions, addressed to him for extraordinary remedies, to the Chancellor and Master of the Rolls, or one of them, to decide according to "honesty" or "conscience," expressions equivalent to equity in the sense of fairness. Somewhat later, in the reigns of Henry V. and Edward IV., the word "equity" was itself used. The use of the term "conscience" was due to the fact that the Chancellor, with rare exceptions, was an ecclesiastic trained in the practice of canon law, and accustomed to preside over the *Forum Conscientiæ*. The explanation that he was keeper of the King's conscience, and bound, therefore, to see that nothing contrary to conscience was allowed, is a later and artificial theory. Several points of Chancery procedure can be directly traced to the ecclesiastical profession of its chief judge—as, the importance attached to an oath taken on commission or affidavit, the writs of subpœna, and the mode of compelling discovery of documents in the hands of an opponent by one form of that writ. It is from the reign of Edward III. that the wide jurisdiction of the Court of Chancery dates. In that reign it is first called by Fleta the King's Court, *Curia Sua*. It included both an ordinary, sometimes called a common-law side, and an extraordinary or equity side. In the former, the Chancellor decided petitions of right, rescission of letters-patent, executions upon recognisances, and a few other special matters. In the latter, it decided all petitions of grace referred to the Chancellor by the King. The number of these steadily increased as the business of the realm grew too large for the Council, and the Chancellor and Master of the Rolls, with a growing number of subordinates, Vice-Chancellors and Masters in Chancery, showed a superior capacity in dealing with cases of this kind. On the other hand, the Common Law Courts, with the exception of the Exchequer, which silently assumed extraordinary jurisdiction of an equitable kind, but of no great extent (transferred to the Court of Chancery by 5 Vict. c. 5), continued to decline to entertain cases of an equitable character, which often required the decision of complicated disputes involving a number of parties, and incapable of being reduced to simple issues.

**567.** The history of the English law must be referred to as to the conflicts of the Court of Chancery with the Common Law Court, the House of Commons, and the House of Lords, in which it was generally successful. It failed, however (as the Court of Session in Scotland did), in stopping appeals from its decisions to the House of Lords. Its



cogent powers and ever-increasing jurisdiction were due largely to its president being the Lord Chancellor, whose authority was far greater than any of the Common Law Courts, but also, to some extent, to the adaptations and alterations made through the equity doctrines introduced by a succession of great Chancellors, of whom the chief were Bacon, Ellesmere, Nottingham, Hardwicke, and Eldon. During the Chancellorship of Eldon it became generally recognised that the time for introducing new equitable doctrines by the will of a single judge, even of a Chancellor, had ceased. While Vaughan C.J., in the reign of Charles II., said, "I wonder to hear of citing precedents in matter of 'equity,'" Eldon declared that prior decisions in equity were as binding as those in common law, and, their number having become so large, there was little room for new equity. While he altered the law in many Scots appeals, he rarely overruled precedents of the English Chancery Court judges, who developed equity according to their own view of the ethical standard as applied to legal affairs.

**568.** About the same time the Court of Chancery, notwithstanding its high pretensions as a Court of Conscience or Equity, had acquired a character of accumulating the common judicial abuses, but to a greater extent than had been before known. Its procedure became dilatory, its pleadings verbose, its decisions fluctuating, its costs enormous, and its retention of suitors' funds in its own hands discreditable. These abuses were gradually removed or lessened by legislation, or the action of the Chancery judges themselves. But the fundamental inconvenience caused by the separation of the Courts of Law from the Courts of Equity, which led to circuitry of process and unnecessary conflicts of decisions in the same case, continued. It was at length felt that the time had come for the union or fusion of the two jurisdictions of law and equity, and this was effected, or at least attempted, in a considerable degree with success, by the Judicature Act of 1873.<sup>1</sup> This statute has sometimes been represented as a triumph of the Chancery procedure, but it must be borne in mind that common-law judges never admitted that the common law did not give weight to equity, and that many common-law principles, and much common-law practice, was retained under the Act. Its real character may more truly be represented as an attempted amalgamation of what was deemed best in both jurisdictions.

SUBSECTION (2).—*Chancery Jurisdiction prior to the Judicature Act.*

**569.** The extent of the equity jurisdiction of the Court of Chancery, as it stood prior to 1873, is summed up in s. 34 of the Judicature Act of that year, which, while it fused law and equity, in so far as it declared that they were to be concurrently administered, and that all equitable rights, titles, grounds of relief, or defences were to be given effect to in any action, by any judges, or judges of the High Court of Justice, yet assigned to the Chancery Division of the High Court the jurisdiction

<sup>1</sup> 36 & 37 Vict. c. 66.

in such matters as had been formerly under the exclusive jurisdiction of the Court of Chancery. These were—

1. The administration of the estates of deceased persons.
2. The dissolution of partnerships; taking partnership accounts.
3. The redemption and foreclosure of mortgages.
4. The raising of portions or charges on land.
5. The sale and distribution of proceeds of property subject to any lien or charge.
6. The execution of trusts, charitable and private.
7. The rectification and cancellation of deeds and written instruments.
8. Specific performance of contracts.
9. Partition and sale of real estates.
10. Wardship of infants and care of their estates.

SUBSECTION (3).—*Present Jurisdiction of Chancery Division.*

**570.** The effect of these provisions practically is, according to writers on English equity, that the exclusive jurisdiction of the Court of Chancery is retained in the Chancery Division, that the concurrent jurisdiction of the Court of Chancery still continues in the Chancery Division, and that only the auxiliary jurisdiction which the Court of Chancery exercised in aid of the common-law suitor, to give him, on grounds of equity, full relief, being no longer necessary (for the Common-Law Divisions themselves exercise the jurisdiction), is abolished. As a distinct class of lawyers practise in the Chancery Division, and the judges in that Division are usually chosen from that class, and its decisions are separately reported, the fusion of law and equity in England is still incomplete, and possibly less complete than some of the authors of the Judicature Act intended. Still, common-law barristers are sometimes appointed to the Chancery Division, or as Lords Justices in the Court of Appeal, from that class, and lawyers of both the common-law and Chancery bars, and of the Scottish and Irish bars, sit in the House of Lords, and this intermingling of judges must tell in favour of more complete fusion of law and equity. Circuity of action and double procedure have been effectually put down, but the existence of equity and equitable rights, as distinct from law and legal rights, is still acknowledged, and principles or rules of equity are still frequently appealed to. The provision of the Judicature Act is that “in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the Rules of Equity and the Rules of Common Law with reference to the same matter, the Rules of Equity shall prevail.”<sup>1</sup> Unless such rules are interpreted to mean rules existing before 1873, equity is still, in England, a progressive force, which may modify, correct, and enlarge the strict law where the judges of the High Court of Justice or the House of Lords deem this necessary or expedient.

<sup>1</sup> 36 & 37 Vict. c. 66, s. 25 (11).

SUBSECTION (4).—*Maxims of English Equity Courts.*

**571.** In conclusion, it may be worth while to give the maxims which all text-writers upon English Chancery practice state as the fundamental rules on which English equity was administered and enlarged in the old practice of the Chancery Courts, and which continue, they say, to be given effect to in the united High Court of Judicature.<sup>1</sup>—

1. Equity will not, for a merely technical defect, suffer a wrong to be without a remedy.

2. Equity follows the law.

3. When there are equal equities, the first in time prevails.

4. When there are equal equities, the law prevails.

5. He who seeks equity must do equity.

6. He who comes into equity (*i.e.* a Court of Equity) must come with clean hands.

7. Delay defeats equities.

8. Equality is equity.

9. Equity looks to the intent rather than the form.

10. Equity looks on that as done which ought to have been done.

11. Equity imputes an intention to fulfil an obligation.

12. Equity acts *in personam*.

**572.** These are a curious mixture of old rules of law, derived from the Roman law and principles of ethics, transferred or applied to law and rules of procedure in Chancery. They are useful enough as a *memoria technica*, and as a key to many of the decisions in the Chancery Courts; but the key itself requires many directions how to use it, as may be seen in the elaborate treatises on the subject of English and American equity. They make no pretence to be either a logical or philosophical arrangement of equity, even of equity as administered by the Chancery Court. Some of them were used by Chancery judges for the purpose of enlarging Chancery jurisdiction. So the first maxim, which is also a common-law maxim, "There is no wrong without a remedy," was used to overrule the Common-Law Court when they gave effect to what the Chancery judges held to be merely technical defects. The last maxim, "Equity acts on the person," was employed to give the Court of Chancery jurisdiction over land and other property in other countries, provided it could effect service on the person of the legal owner, or, it might be, in the case of trustees, of only one of its legal co-owners, as in the *Orr-Ewing* case.<sup>2</sup> The third, seventh, and eighth maxims were well known to the civilians in the forms: "*Prior tempore potior Jure; Vigilantibus non dormientibus jura subveniunt; Æqualitas est æquitas.*" The others are, generally speaking, moral precepts; thus "Who seeks equity must do equity," and "He who comes into equity must come with clean hands," are only legal expressions of "Do as you would be done by."

<sup>1</sup> Snell, *Principles of Equity*, 11th ed., p. 14.

<sup>2</sup> *Ewing v. Orr-Ewing*, 1885, 13 R. (H.L.) 1; 10 App. Cas. 453.



The ninth, "To regard the intention rather than the form," is the rule of all Courts which construe documents; but it must be kept in view that it is restricted by the rule of evidence, that when a matter has been reduced to writing the meaning must be found in the writing, and that extrinsic evidence is allowed only of the surrounding circumstances, or to explain patent ambiguities.

#### SECTION 4.—EQUITY IN THE LAW OF SCOTLAND.

##### SUBSECTION (1).—*Prior to Institution of Court of Session.*

**573.** Prior to the institution of the Court of Session in 1532, there can scarcely be said to have been any general or definite body of Scots law, apart from a small number of statutes. There were so few general customs that it was even a question whether the expression common law meant the Roman law or the Scots customary law. Consequently there could be no distinction between law and equity. Stair assumes that "the law of Scotland at first could be no other than 'æquum et bonum,' equity and expediency," but he means probably that there was no statute law. There were in fact, at the earliest period from which we know anything certain of Scots law, many Courts administering different kinds of law which could not be called equity—the Curia Regis for Crown vassals; the Court of the Justiciar for crime; of the Chamberlain for revenue and burghal administration; of the Sheriff, as representative of the King, in the counties; the Feudal Courts of Lords of Regality and Barons within their several jurisdictions; and the Ecclesiastical Courts of the Bishop's Officials. Each of these Courts was no doubt bound by certain authorities, and had rules of procedure; but the judges acted largely according to their own discretion, which was too arbitrary to be called equitable; and there was no authoritative and easily accessible Court of Appeal. The difference and fluctuation in the practice of these various Courts, whose decisions were not reported, was one of the causes which made the supreme central civil Court necessary. The new Court united the jurisdiction of the earlier itinerant Session of James II. and of the daily Council of James IV. with that of the Committee of Parliament called Lords Auditor and the Council of the King called the Lords of Council, so that the Lords of Council and Session, the title its judges assumed from the first, combined both a legal and an equitable jurisdiction. Half of its judges being ecclesiastical lawyers, it necessarily also derived much of its law from the canon, and, either directly from Justinian's *Corpus Juris*, or through the canon, from the civil law of Rome. It was from its foundation a Court of Equity as well as of Law.

##### SUBSECTION (2).—*Stair and Erskine's Doctrine of Equity.*

**574.** Stair, after referring to the English Court of Chancery as a distinct Court of Equity, explicitly states: "Other nations do not divide the jurisdiction of these Courts, but supply the cases of equity and

conscience by the noble office of the Supreme Ordinary Courts, as we do." This noble office, commonly called *Nobile Officium*, in civil cases he regarded as peculiar to the Court of Session, and not possessed by Sheriff or other inferior Courts. He likens it to the power of the prætor, and gives, as examples of its use—

1. Modifying exorbitant penalties in bonds and contracts.
2. Treating legal executions, when exorbitant, as redeemable securities, within a time fixed, called the legal.
3. Reducing its own decrees when there is anything wanting in material justice, but not for mere informalities.
4. Allowing appraisings to creditors when the apparent heir of the debtor renounced the succession.
5. Supplying defective conveyances by adjudications in implement.
6. Examining witnesses *ex officio*, i.e. on the Court's own motion, in cases where writs are suspected as fraudulent, and, where the proof is pregnant, sustaining it though contrary to the writ; and by this "trusts are discovered." But the later statute 1696, c. 5, restricted the proof of trust to writ.
7. Allowing proof before answer as to relevancy.<sup>1</sup>

**575.** By equity Stair understood both "the moderation of the extremity of written law and the whole law of the rational nature, for otherwise it could not possibly give remedies to the rigour and extremity of positive law in all cases." These are the two first senses of equity explained at the commencement of this article, the one correctory of the strict law and the other declaratory of the law of nature. Stair makes an advance upon the Roman term *jus naturale*, by calling it "the law of the rational nature." This was due to the clearer conception of this source of equity to which Grotius and the jurists of the seventeenth century had attained. Nature was no longer mere animal nature, as with Ulpian, or human nature, as with Gaius and the other early Roman jurists: it was reason, the highest part of the nature of man. He takes the side of Grotius, who held that law was founded on principles; and observes, it was not merely a "congestion of the contents of the law." Equity or the law of nature, he says, "standeth wholly upon practical principles, which are created in and with the soul of man"; and "equity is the body of the law, and the statutes of men are but as the ornaments and vestiture thereof, and in the explanation of every part of it will most fitly fall in accordingly. But the best demonstration of this will be ocular, by our delineation of equity and positive law together." The whole of Stair's Institutions is, in fact, an ocular demonstration of this text; for while his citation of decisions and exposition of statutes are as full as those of any lawyers of his time, he always seeks to discover the equitable principles on which they were grounded. "The principles of equity," he remarks, "are the efficient causes of rights and laws; the

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<sup>1</sup> Stair, iv. 3.

principles of positive law are the final causes or ends for which laws are made and rights constituted and ordered.”<sup>1</sup> This view of Stair long continued to influence the development of the law of Scotland. It has been claimed for it that the decisions of the Scottish Courts were based more frequently than those of the English upon principles, and less upon mere precedents. But as the number of reported Scottish decisions increased, and the practice of founding upon the decisions of English Courts has become common since the Union, this is less the case than before that date, and a leading practitioner recently observed that Scottish lawyers were becoming more and more case-lawyers.

**576.** Erskine’s doctrine of equity is a brief echo of that of Stair, but he adds a far-reaching remark, “that if the extraordinary provision of the *Nobile Officium* were not now transferred to the Court of Session from the Privy Council, there would be a defect in that part of our Constitution, and many wrongs be without a remedy. For which reasons the author of Historical Law Tracts (Lord Kames) reasonably conjectures that it will be soon considered as part of the province of the Court of Session to redress all wrongs for which a peculiar remedy is not otherwise provided.”<sup>2</sup> In fact, the flexible and adaptable general forms of action by declarator, reduction, petitory and possessory summonses, whose conclusions can be easily moulded to suit the circumstances of any case, and the use of interdicts borrowed from the civil law, enabled the Scottish Courts to provide a remedy for nearly every case, in a way which could not be done by the writs of the English Common-Law Courts, each of which was confined to a particular state of facts. The action on the case, introduced by 13 Edw. II., was an attempt to cure this, but fell short of a sufficient remedy, and led to the Chancellor providing remedies in his own Court.

#### SUBSECTION (3).—*Why no separate Equity Court.*

**577.** The absence of a separate Court of equity in Scotland was not due to one, but to many, causes: (1) the adoption from the first of much of the equity of the Roman law, both civil and canon; (2) the acceptance of these equities as subsidiary to the native customs and statutes; (3) the Chancellor himself being a member of the Court of Session when first instituted; (4) the education of the leading Scottish lawyers in the sixteenth and seventeenth and first half of the eighteenth centuries abroad at the Universities of France and the Low Countries, who brought back with them the developed equity taught by the professors of the civil law, and the works of the civilians; (5) the tendency of the Scottish intellect to study mental philosophy; finally (6) the circumstance that, when the Roman law began to be less quoted in the Court and chiefly cultivated for educational purposes, the English equity decisions began to be quoted. While there was no

<sup>1</sup> Ersk. Inst. i. 1, 18.

<sup>2</sup> *Ibid.*, i. 3, 23.



separate Court of equity in Scotland, the Court of Session always paid attention, though in different degrees at different times, to equitable considerations. Scotland thus gained the benefit of using a large body of equity decisions without the disadvantage of separate jurisdictions.

SUBSECTION (4).—*Kames, Principles of Equity.*

**578.** Almost the only treatise on equity in English, apart from works on the practice of the Court of Chancery, was written by the Scottish judge, Lord Kames. His *Principles of Equity* was published in 1766, dedicated to Lord Mansfield, and received the approbation of Lord Hardwicke, who judged it as an English equity lawyer, and the censure of Blackstone, who represented the view of the English common lawyers. Mansfield, a Scotsman by birth and well versed in the Roman civil law, had already introduced many principles of Roman equity into English mercantile law, and was followed by several leading common-law judges. But English equity had taken deep roots and acquired a wider jurisdiction in the Chancery Courts. The equity whose principles Kames sought to discover answered more nearly to the equity of the Chancery Courts, and several of the too loosely expressed rules, stated at the close of his work, occur in the twelve maxims in which English Chancery practitioners summed up the grounds of the jurisdiction of their Courts, *e.g.*: "He who demands equity must give equity"; "For every wrong there ought to be a remedy"; "No one is permitted to take advantage of his own fraud."

**579.** The *Principles of Kames* failed in precision, and his book has never been deemed a great authority. Yet it went through three editions between 1760 and 1778, and was at one time frequently cited in the Scottish Courts. It had considerable influence with the judges of last century, and led them to allow a more frequent appeal to equity. In the interesting correspondence with Lord Hardwicke, preserved in Lord Woodhouselee's *Life of Kames*, the Scottish judge maintains, as might be expected, the superiority of the practice of Scotland, in administering law and equity in the same Court, to the English separation of the jurisdictions. The English Chancellor, although he concedes that this is better for individual suitors, contends, as Bacon did, that the development of equity is more rapid when it has a Court of its own. This is a long-standing and not yet settled controversy. Although the Scottish practice has, since the Judicature Act of 1873, been to a large extent adopted in England, it has yet to be seen whether the administration in England of both law and equity in one Court, and by the same judges, may not check equity. It has been sometimes thought that it has done so in Scotland. If it did so to a material extent, and left to legislation alone the task of correcting the errors of law, the result would be serious, for every lawyer knows how imperfect an instrument parliamentary legislation is. The number of amending statutes is pregnant proof how often and how soon

statute law requires to be itself corrected. Perhaps, however, it may be found that the office of judges, in introducing equitable modifications of the written and rigid law, does not cease when they have power to administer both in the same Court and with reference to the same cases. Much will depend on the class of men appointed to the higher judicial offices. While they are bound by express statutory provisions and decided cases of authority, there still is a large region of law in which they can apply equitable principles.

SUBSECTION (5).—*Present Position of Equity in Scotland.*

**580.** The present position of equity in the Scottish Courts may be thus stated. The Court of Session, as the Supreme Civil Court, is still deemed in all branches of its jurisdiction, as it was at its commencement, a Court both of equity and law. It is quite competent for "a judge," said its late President, "to address to the jury principles of equity as well as rules of law."<sup>1</sup> Its forms of actions, especially declarator, reduction, suspension and interdict, are equitable forms which can be applied to almost any variety of facts.<sup>2</sup> Equitable defences can always be pleaded, and their scope has in many cases been extended. For example, compensation was introduced by the Act 1592, c. 143, but only where both debts were liquid. It has been extended to debts which, although not liquid, can be immediately liquidated by the equitable doctrine *liquidum est quod statim liquidari potest*; and in bankruptcy, by the equitable doctrine of balancing accounts, to a debt due to a creditor who is also a debtor of the bankrupt, although his debt is illiquid.<sup>3</sup> Again, since the repeal of the Usury Laws and until the passing of the Moneylenders Act, it was not illegal to stipulate for any amount of interest; but the Court has cut down, on grounds of equity, a usurious contract, in which bills for £250 had been taken without consideration, except a delay of twenty-four hours in enforcing payment of a debt with usurious interest.<sup>4</sup> In this case some of the judges observed that the usurious interest itself might have been cut down also, if the pursuer had not consented to pay it. Similar usurious contracts have been refused effect in more than one Sheriff Court. As absence of consideration is not a ground for setting aside a contract by the law of Scotland, the only ground on which these decisions can be based is that the Courts will not allow exorbitant interest.

**581.** The *Nobile Officium*, or extraordinary jurisdiction, of the Court of Session has been recognised, as we have seen, since its foundation,<sup>5</sup> although the extent to which it will be exercised has varied. The tendency in recent times has been, perhaps, to restrict it in general to cases where there is a direct or analogous precedent or a manifest necessity for the intervention of the Court. This is, in fact, an equitable

<sup>1</sup> *Forrest & Barr v. Henderson*, 1869, 8 M. 187, at p. 195.

<sup>2</sup> *Kames*, Law Tracts, 3rd ed., p. 228.

<sup>4</sup> *Young v. Gordon*, 1896, 23 R. 419.

<sup>3</sup> *Bell*, Com. ii. 118.

<sup>5</sup> *Stair*, iv. 3, 1.

jurisdiction; and it will be found that most cases which fall under it have been, in England, held to belong to the Court of Chancery. It is expressly deduced by Stair from the Roman law and the office of the prætor;<sup>1</sup> and he remarks that every sovereign Court must have the power unless there be distinct Courts of equity, as in England. The procedure in the Bill Chamber by suspension and interdict, and especially by interim interdict, is another and an early example of Scottish equity. The existence of a separate Court or Chamber for such cases is an accident, and has led to inconvenient results, which are avoided in the Sheriff Court. The effect of the interim interdict is to supply a form of process which can be worked more summarily, and in vacation as well as in session, to regulate the state of possession, on principles of convenience and equity, until the absolute right can be determined.

SUBSECTION (6).—*Equitable Jurisdiction of Court of Session under Nobile Officium.*

**582.** The following are the chief categories of the equitable jurisdiction of the Court of Session now exercised in virtue of its *Nobile Officium*, besides those stated by Stair, with a few recent examples of its exercise under each:—

1. Petitions not founded on statute, of which there are many kinds; as for the custody of children, the appointment of guardians, the removal of trustees, the appointment of judicial factors, the sequestration of estates pending litigation, and on other grounds;<sup>2</sup> for authority to change a name, to appoint public officers *ad interim*, to control the proceedings of public bodies when they act *ultra vires*,<sup>3</sup> or of arbiters on the same ground.<sup>4</sup> The power of the Court to give new remedies when new cases occur is shewn by the case of *Mitchell*,<sup>5</sup> which was a petition to authorise a widow to remove her husband's body to another place of interment. The Court remitted to the Sheriff, with powers which he would not himself have possessed, as it has done in other cases where the *Nobile Officium* was in question, but the decree could be most conveniently adjusted by the local Court.

2. The whole law of trusts is practically due to an equitable development of the principles of the contracts of mandate and deposit, and the Scottish Court has developed it and kept it in harmony with the English law by frequent references to English equity decisions. With regard to charitable trusts, the Court has power to declare their objects, and to settle or vary schemes for their execution.<sup>6</sup> This is similar to the jurisdiction of the Court of Chancery,<sup>7</sup> but the Court of Session has not the visitorial jurisdiction of the Court of Chancery.<sup>7</sup>

<sup>1</sup> Stair, iv. 3, 1.

<sup>2</sup> *Ewing v. Orr-Ewing*, 1885, 13 R. (H.L.) 1; 10 App. Cas. 453.

<sup>3</sup> *Nicol*, 1870, 9 M. 306.

<sup>4</sup> *Watson v. Robertson*, 1895, 22 R. 362.

<sup>5</sup> 1893, 20 R. 902.

<sup>6</sup> *Glasgow Royal Infirmary*, 1887, 14 R. 680, and 15 R. 264.

<sup>7</sup> *M'Laren, Trusts*, 1449.



3. The Court has jurisdiction, but only in cases of practical necessity, to supply omissions in statutes.<sup>1</sup>

4. It has also, though rarely, supplied provisions for a *casus improvisus* in deeds. Its powers under this head have been enlarged, as regards granting powers to trustees, where expedient for the execution of the trust even although at variance with its terms.<sup>2</sup>

5. It has a general power to review the proceedings of all inferior Courts, unless expressly excluded by statute.<sup>3</sup> This, though perhaps not strictly an equitable jurisdiction, has the effect of introducing equitable considerations into all matters dealt with in the inferior Courts, and it did so especially during the period when there was doubt as to the equitable jurisdiction of the Sheriff Court.

6. It has an equitable jurisdiction in the cases stated in the passage already cited from Stair; <sup>4</sup> but this jurisdiction is not now, in several of these cases, exclusive, but may be exercised also by the Sheriff Court, *e.g.* the power to examine witnesses *ex officio*, or to allow proof before answer on the relevancy.

#### SUBSECTION (7).—*Equitable Jurisdiction of the Sheriff Court.*

**583.** It seems originally to have been held that the Sheriff had no jurisdiction in equity, but this rule was soon departed from, and equitable defences, *e.g.* homologation, *rei interventus*, retention, salvage, and others, are now, and have been for long, pleadable in the Sheriff Court. "If against a process founded on common law an equitable defence be stated, it is the practice of inferior Courts to judge of such defences."<sup>5</sup> This may be on the view stated by Kames, that "what is a rule of equity, when fully established in practice, is considered common law."<sup>6</sup> Kames, upon the same ground, allows the competency of the Sheriff Court in many actions founded originally on equity, "which have by long practice obtained an establishment so firm as to be reckoned branches of the common law. This is the case with the *actio negotiorum gestorum* and many others." Indeed, it is thought that the rule is now reversed, and that the Sheriff Court has a general equitable jurisdiction in all actions as well as defences, except (1) the class of cases which have been treated as peculiar to the *Nobile Officium* of the Court of Session, and (2) with regard to a few forms of action, such as reduction, proving the tenor [apparently] and adjudication, for which it has no forms of process or means of carrying out the necessary decrees.<sup>7</sup> In several of these excepted cases recent legislation has conferred a limited jurisdiction on the Sheriff Courts, and also in declarators (with the exception of such declarators as mainly determine personal status).<sup>8</sup> Reductions

<sup>1</sup> *Von Rotberg*, 1876, 4 R. 263; *Lipman & Co.'s Tr.*, 1893, 20 R. 818.

<sup>2</sup> 30 & 31 Vict. c. 97, s. 3; 11 & 12 Geo. V. c. 58, s. 5.

<sup>3</sup> *Higgins v. Kirk Session of Barony Parish, Glasgow*, 1824, 3 S. 239.

<sup>4</sup> Stair, iv. 3, 2.

<sup>5</sup> Kames, *Principles of Equity*, i. 30.

<sup>6</sup> *Ibid.*, 27.

<sup>7</sup> Dove Wilson, *Sheriff Court Practice*, 4th ed., p. 46.

<sup>8</sup> 7 Edw. VII. c. 51, s. 6 (1).

are still incompetent; but as objections may now be stated to any deed or writing by exception in the Sheriff Court, the effect of the rule is much limited.<sup>1</sup> Suspensions are competent for charges for payment of any sum not exceeding £25 of principal.<sup>2</sup> The above statutory provisions show, however, that equity was not deemed sufficient without legislation to give the Sheriff Courts jurisdiction in such cases. On the other hand, actions of interdict and for specific performance, two of the most important kinds of equitable remedies, appear to have been always, and are certainly now, competent to the Sheriff Court. It may also be remarked generally, that all actions on contracts, other than those which have penal conclusions or are of the nature of executions (diligences) rather than actions, are, by the law of Scotland, actions *bonæ fidei* in whatever Court they are brought. The *actiones stricti juris* of Roman law, in which, as in the old English common-law pleadings, a mere slip in pleading might cast the suit, are, with few if any exceptions, unknown. This is so to a greater extent than formerly since the more liberal powers of amendment introduced by the Court of Session Act, 1868, and the Sheriff Court Acts, 1876 and 1907.

**584.** The jurisdiction exercised by the Court of Session under the *Nobile Officium* is still beyond the power of the Sheriff Court, and forms now the most important exception to the wide extent of its equitable jurisdiction; but the Court of Session may remit cases which fall under it to the Sheriff, with instructions how to dispose of them.

#### SUBSECTION (8).—*Equity in the Sense of Discretion.*

**585.** This form of equity necessarily belongs to every Court of justice and every judge, to a greater or less extent. It is sometimes expressly conferred by statute, but exists without statute in cases appropriate for its exercise, of which a good example is the power of awarding costs. Here the general rule is that costs follow the event, and the unsuccessful party must pay the judicial and reasonable expenses of his adversary; but it is recognised also that the Court has a discretionary power to award expenses to the unsuccessful party, and to modify or refuse expenses to the successful party. This may be done even in regard to jury trials.<sup>3</sup> These, of course, are exceptional cases, and the general rule is followed, unless in strong circumstances of misconduct, or of causing unnecessary expense, or of failure in a distinct part of the case. On the other hand, the exercise of discretion may be limited or cut off by statute where an express rule is laid down, which the judge is bound to follow, or by precedent, where there is a binding decision that discretion is excluded in the same or closely similar case.

**586.** Another instance of discretionary equity is as to the measure of damages, which, though a proper question for a jury, is in Scottish practice often left to the decision of the Court, which then acts as if it

<sup>1</sup> 7 Edw. VII. c. 51, Sched. I., Rule 50.

<sup>2</sup> 1 & 2 Vict. c. 119, s. 19.

<sup>3</sup> *Shepherd v. Elliot*, 1896, 33 S.L.R. 495; 3 S.L.T. 330.

were a jury, and takes an equitable or common-sense view of the whole circumstances of the case. There are, however, cases in which the measure of damages, or the mode of estimating damages, is fixed by long practice and decisions, from which a judge will not depart, *e.g.* in the estimation of loss by breach of a contract of sale. Discretion is more generally operative in actions grounded on injury, where the amount of actual loss is more a question of average and of common sense than of precise calculation.

587. Many matters of procedure also are left to the discretion of the judge; and where this is so, it is a general rule that an Appeal Court will not overrule his discretion, although its opinion may differ from his.

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## ERASURES.

*See* DEEDS, EXECUTION OF.

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## ERECTION OF PARISHES.

*See* CHURCH.



# ERROR.

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## SECTION I.—INTRODUCTORY.

**588.** A contract complete in terms cannot usually be repudiated on the ground of error. “The cases in which mistake affects contract are the rare exceptions to an almost universal rule that a man is bound by an agreement to which he has expressed a clear assent, uninfluenced by falsehood, violence, or oppression. If he exhibits all the outward signs of agreement, the law will hold that he has agreed.”<sup>1</sup> “It is sought to reduce the contract simply on the ground that the appellant did not intend to make the offer which the Courts have held that he did make. Such a contention is far-reaching in its consequences. It would apply in every case where the parties differed in their construction of an essential part of the contract.”<sup>2</sup>

**589.** Nevertheless a contract may be affected by error. The corresponding term in English law is “mistake.” Error may belong to either or both of two classes, viz. (1) error in intention, *i.e.* error on the part of one or both of the contracting parties which has been caused by a misapprehension of some matter material to the decision as to whether or not to enter into the contract; (2) clerical error, *i.e.* some slip or mistake in the recording of the contract. In the first of these classes the error of one of the parties may be due to untrue statements made by the other party or his agent. Where this is the case, the legal decision as regards the rights of the parties depends on the law of fraud or innocent misrepresentation, as the case may be. See FRAUD AND MISREPRESENTATION. Error as hereafter considered is for the most part

<sup>1</sup> Anson, Contract, 16th ed., p. 162.

<sup>2</sup> *Stewart v. Kennedy*, 1890, 17 R. (H.L.), per Lord Herschell at p. 25.

confined to cases where it cannot be ascribed to misrepresentations of the other party, fraudulent or otherwise.

## SECTION 2.—ERROR IN INTENTION: ERROR IN ESSENTIALIBUS.

### SUBSECTION (1).—*Generally.*

**590.** “There is no doubt of the general rule that a party cannot reduce a contract on the ground that he has entered into it under error, if his contention is merely that he would not have contracted if he had known all the relevant facts. A plea to that effect has been judicially characterised as ‘so preposterous as to be unworthy of any attention.’<sup>1</sup> But the question is one of degree. Cases may arise where the error is so material as to preclude any real consent, and therefore leave a contract, or apparent contract, without that basis of agreement on which all contractual obligation must rest. In such cases the apparent contract is not voidable on the ground of error, but void because there never was any contract at all. While the interpretation of contractual obligation must accept, as a fundamental rule, that a party must be taken to mean what he says and is barred from asserting that his words or acts did not represent his intention, that rule may come in conflict with one equally fundamental—that the contractual obligations of the parties must rest on their consent.”<sup>2</sup>

**591.** Error, apart from fraud, cannot have the effect of avoiding contractual relations unless it is *in essentialibus*.<sup>3</sup> Discrepancies which do not amount to essential error may give rise under certain circumstances to other claims, *e.g.* in the sale of goods to claims for damages for breach of warranty. “Innocent misrepresentation does not authorise a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken.”<sup>4</sup> Error, in order to be *in essentialibus*, must have relation to one or more of the following aspects of the contract: (a) subject-matter; (b) identity of the contracting parties; (c) price; (d) quality of the subject (in cases where this is expressly or impliedly essential); or (e) the nature of the contract.<sup>5</sup>

### SUBSECTION (2).—*Error as regards Subject-matter.*

**592.** Parties to a contract may not be in agreement as to the particular thing about which they are contracting. Thus if one purchase a picture or an object of art in the belief that it is an original, and it is in fact a copy, there is no contract.<sup>6</sup> Where at a sale by auction

<sup>1</sup> *Forth Marine Insurance Co. v. Burnes*, 1848, 10 D. 689, per Lord Fullerton at p. 700.

<sup>2</sup> Gloag and Henderson, Introduction to the Law of Scotland, p. 64.

<sup>3</sup> Bell's Prin., s. 11; *Stewart v. Kennedy*, *supra*.

<sup>4</sup> *Kennedy v. Panama Mail Co.*, 1867, 2 Q.B. 580.

<sup>5</sup> Bell's Prin., s. 11; Gloag on Contract, p. 484.

<sup>6</sup> Cf. *Edgar v. Hector*, 1912 S.C. 348, per Lord Mackenzie at p. 352.

a buyer bid for a bale which he thought contained hemp, and the auctioneer knew that it held tow and thought that the buyer was bidding for tow, it was held that there had been no *consensus* and no sale.<sup>1</sup> Similarly when there was an apparently definite contract relating to the cargo of a ship, but it happened that there were two ships of the same name both sailing from the same port with similar cargoes, and it was proved that the seller intended to sell the cargo of one ship while the buyer intended to buy the cargo of the other, it was held that there was no contract.<sup>2</sup> A material difference between buyer and seller as to the area of an estate which is sold, when there has been no reference to titles by which its boundaries are fixed, may be of an extent sufficiently important to affect the identity of the subject-matter of the contract.<sup>3</sup>

### SUBSECTION (3).—*Error as to Party.*

**593.** Where in contract the circumstances are such that the identity of the parties contracting is material, and one of the parties is in error as to the identity of the other with whom he is contracting, the contract is void, there having been no true consent.<sup>4</sup> Generally there is present in such cases an element of fraud. The legal principle is thus illustrated by Lord Kinnear. "If a man obtains goods by pretending to be somebody else, or by pretending that he is agent for somebody who has in fact given him no authority, there is no contract between the owner of the goods and him; there is no *consensus* which can support a contract. The owner does not contract with the fraudulent person who obtains the goods, because he never meant to contract with him. He thinks he is contracting with an agent for a different party altogether. He does not contract with the person with whom he in fact supposes he is making a contract, because that person knows nothing about it and never intended to make an agreement; therefore there is no agreement at all."<sup>5</sup> But whether there has been fraud or not, no real consent having been present between the contracting parties, the contract is *ab initio* void, and its invalidity stands even in questions where third parties are involved. Thus if one accustomed to deal with X. through the agency of Y. places orders with Y. not knowing that the agency has terminated and that Y. represents Z. who deals in the same class of goods, but as to whose skill or credit the purchaser knows nothing and with whom he had no intention of dealing, there is no *consensus* and therefore no contract.

<sup>1</sup> *Scriven Bros. v. Hindley & Co.*, [1913] 3 K.B. 564; see also *Stuart & Co. v. Kennedy*, 1885, 13 R. 221.

<sup>2</sup> *Raffles v. Wichelians*, 1864, 2 H. & C. 906.

<sup>3</sup> *Hepburn v. Campbell*, 1781, Mor. 14168; *Hamilton v. Western Bank*, 1861, 23 D. 1033; *Woods v. Tulloch*, 1893, 20 R. 477; *Houldsworth v. Gordon Cumming*, 1910 S.C. (H.L.) 49.

<sup>4</sup> *Stair*, i. 9, 9; *Ersk.* iii. 1, 16; *Bell's Prin.*, s. 11; *Bell, Com.* i. 314; *Pollock on Contract*, 9th ed., p. 507; *Ex parte Barnett*, 1876, 3 Ch. D. 123; *Dunlop v. Crookshanks*, 1752, Mor. 4879; *Gordon v. Street*, [1899] 2 Q.B. 641.

<sup>5</sup> *Morrisson v. Robertson*, 1908 S.C. 332, at p. 339.



Two English cases provide good examples: (1) a person was induced to become a member of a company by the fraudulent statement that it was another company carrying on a similar business, of which he in fact desired to become a member; it was held that there had been no consent, in that there had been an essential error as to the identity of the company, and that the contract was void; consequently when the company which the person had actually joined was wound up, he was not liable as a contributory;<sup>1</sup> (2) a person called Blenkarn placed an order for goods with some manufacturers, who supplied them under the belief that they had been ordered by a firm of Blenkiron. When the goods were delivered to Blenkarn, he resold them. The sub-purchasers had no title to the goods in respect that the property in them had not passed to Blenkarn, as the sellers were in essential error as to the identity of the party with whom they had contracted.<sup>2</sup>

SUBSECTION (4).—*Error as to Price or other Consideration.*

**594.** If parties are under mutual error as to consideration, there is no binding contract between them.<sup>3</sup> Where one party thought that, in a sale of cattle, the price payable had been fixed, and the other party thought that it was to be fixed later when the quality of the beasts had been determined, it was held that there had been no completed contract.<sup>4</sup>

SUBSECTION (5).—*Error in Relation to Quality.*

**595.** The general rule is that, if parties are agreed as to the identity of the particular thing about which they are contracting, error by one of them as to its qualities does not affect the contract's validity so long as there has been no misrepresentation. The difference, however, between the qualities in fact possessed by the subject-matter of a contract and the qualities thought by one of the parties to a contract to be possessed by it may be so great as to amount to a difference in kind. In the latter case, the difference if proved may render the contract void.<sup>5</sup> Thus the lessee of a deer forest sought to reduce the lease on the ground of error, averring that the ground let to him was not a deer forest in respect that during the stalking season stags were not to be found there. An issue was allowed from the terms of which it appears that the decision proceeded on the ground of error on the part of the lessee rather than on the ground that the lessor was in breach of the contract through failure to supply a proper deer forest.<sup>6</sup> Similarly it has been successfully maintained that, if the objects of a company as set forth in the Memorandum of Association are materially different

<sup>1</sup> *In re International Society of Auctioneers and Valuers*; *Baillie's case*, [1898] 1 Ch. 110.

<sup>2</sup> *Cundy v. Lindsay*, 1878, 3 App. Cas. 459.

<sup>3</sup> *Bell, Com. i. 314.*

<sup>4</sup> *Wilson v. Marquis of Breadalbane*, 1859, 21 D. 957; *Douglas v. Baynes*, [1908] A.C. 477; *Gray v. Binny*, 1879, 7 R. 332.

<sup>5</sup> *Dig. xviii. l. 11*; *Pollock on Contract*, p. 513; *Edgar v. Hector*, 1912 S.C. 348.

<sup>6</sup> *Earl of Wemyss v. Campbell*, 1858, 20 D. 1090; and see *Hart v. Fraser*, 1907 S.C. 50.

from those set forth in the prospectus, an application for shares in the company which had been induced by the prospectus was void on the ground that the difference between the company as set forth in the prospectus and as actually formed was a difference in quality amounting to a difference in kind.<sup>1</sup> Where goods have been sold on the understanding that they are not subject to any *nexus*, such as liability to impressment for Government purposes, and the contrary turns out to be the fact, it is thought that the contract could be reduced on the ground of error.<sup>2</sup>

**596.** In cases of sale by description, the seller warrants that the goods are of the description given, and there is no room for the principle that the contract of sale is void on the ground of essential error. Failure in any material part of the contract is sufficient to allow a buyer either to reduce the contract or merely to claim damages.<sup>3</sup> "In a sale by description the question is whether the seller has fulfilled his contract by supplying what he sold; in the sale of a specific article, whether the buyer's error as to the qualities of the article is so complete as to preclude any real consent to buy it."<sup>4</sup>

**597.** Where error in regard to the quality of the subject-matter of a contract does not amount to error in regard to its kind, the validity of the contract cannot be challenged where there has been no misrepresentation.<sup>5</sup> Thus error in regard to the value of property which forms the subject-matter of a contract is not a ground on which the contract can be reduced.<sup>6</sup> Similarly a party cannot maintain that his consent to become a shareholder in a company was given under essential error if it subsequently appears that a valuable contract, stated in the prospectus to have been secured to the company, was not in fact obtained by the company, for this is merely an element affecting the value of the shares and not one rendering the shares issued different in kind to those as set forth in the prospectus.<sup>7</sup>

#### SUBSECTION (6).—*Error as to the Nature of the Contract.*

**598.** When a person enters into a contract believing that he is entering into one of a different kind, he incurs no obligation, since no real consent has been given by him.<sup>8</sup> Thus a party signing an obligatory document is not bound by his signature when he is in the belief that he

<sup>1</sup> *City of Edinburgh Brewery Co. v. Gibson's Tr.*, 1869, 7 M. 886, per Lord Pres. Inglis at p. 891; and see *Mair v. Rio Grande Rubber Estates, Ltd.*, 1913 S.C. (H.L.) 74; *Straker & Sons v. Campbell*, 1926, S.N. 31; *Downes v. Ship*, 1868, L.R. 3 H.L. 343.

<sup>2</sup> *Shankland & Co. v. Robinson & Co.*, 1920 S.C. (H.L.) 103, per Lord Haldane at p. 108.

<sup>3</sup> Sale of Goods Act, 1893, ss. 13 and 62 (1).

<sup>4</sup> Gloag on Contract, p. 493; *Chanter v. Hopkins*, 1838, 4 M. & W. 399; *Jaffé v. Ritchie*, 1860, 23 D. 242; *Bremner v. Dick*, 1911 S.C. 887.

<sup>5</sup> Stair, i. 9, 9; Ersk. iii. 1, 16; Bell, Com. i. 314.

<sup>6</sup> *Scott v. Craig's Reps.*, 1897, 24 R. 462; *Hamilton v. Duke of Montrose*, 1906, 8 F. 1026; *Woods v. Tulloch*, 1893, 20 R. 477; *Smith v. Hughes*, 1871, L.R. 6 Q.B. 580.

<sup>7</sup> *Kennedy v. Panama Mail Co.*, 1867, L.R. 2 Q.B. 580.

<sup>8</sup> Dig. xviii. 1, 9; Bell, Com. i. 313; *Bank of Ireland v. M'Manamy*, [1916] 2 Ir. R. 161.

is signing as a witness only. Similarly a party signing one document under the impression that it is another is not bound,<sup>1</sup> and it is not necessary that his error should have been due to misrepresentation.<sup>2</sup> It should be noted in cases of this nature that while the act of a party in appending his signature cannot import his consent where it did not exist,<sup>3</sup> yet it may operate as personal bar, at least in questions with third parties who have acted in reliance upon his signature.<sup>4</sup> In questions of this kind the degree of care in examining the documents required of an individual by the law depends on the circumstances of the individual, and is not to be measured by that expected of the "reasonable man."<sup>5</sup>

**599.** While consent is excluded and the contract void where a party is in error as to the nature of the contract, ignorance of a particular part or term of the contract has not necessarily the same effect.<sup>6</sup> But the particular part or term may be so vital to the contract as to render ignorance of it a factor equivalent to error as to its general character.<sup>7</sup>

### SECTION 3.—CLERICAL ERROR.

#### SUBSECTION (1).—*General.*

**600.** Where an agreement has been written out incorrectly, or where there is mistake in the wording of a document, the Court may in the exercise of its equitable powers rectify it. Where both parties admit the clerical error there is no difficulty, for if a party admits that an advantage accruing to him is due to a clerical error, he cannot be permitted to benefit by it.<sup>8</sup> A clerical error which is obvious on the face of the document can be rectified whether it is admitted or not.<sup>9</sup> The fact that the party applying to the Court to have the error corrected was responsible for it is no bar to his application.<sup>10</sup> If a contractor agrees to execute works for a gross sum, and the schedule shewing in detail how the gross sum is arrived at contains obvious errors *calculi*,

<sup>1</sup> *M'Laurin v. Stafford*, 1875, 3 R. 265; *Fletcher v. Lord Advocate*, 1923 S.C. 27; *Bagot v. Chapman*, [1907] 2 Ch. 222.

<sup>2</sup> *Buchanan v. Duke of Hamilton*, 1878, 5 R. (H.L.) 69; *Muirhead and Turnbull v. Dickson*, 1905, 7 F. 686; *Harvey v. Smith*, 1904, 6 F. 511; *Ellis v. Lochgelly Iron and Coal Co.*, 1909 S.C. 1278; *Macandrew v. Gilhooley*, 1911 S.C. 448.

<sup>3</sup> *Hogg v. Campbell*, 1864, 2 M. 848.

<sup>4</sup> *Hunter v. Walters*, 1871, L.R. 7 Ch. 75; *National Provincial Bank v. Jackson*, 1886, 33 Ch. D. 1; *Howatson v. Webb*, [1908] 1 Ch. 1; *Laing v. Laing*, 1862, 24 D. 1362; *Gillespie v. City of Glasgow Bank*, 1879, 6 R. 813; but see Gloag on Contract, p. 488.

<sup>5</sup> *Purdon v. Rowat's Trs.*, 1856, 19 D. 206; *Macandrew v. Gilhooley*, *supra*.

<sup>6</sup> *Life and Health Assurance Association v. Yule*, 1904, 6 F. 437; *MacMillan v. Accident Insurance Co.*, 1907 S.C. 484.

<sup>7</sup> *Hogg v. Campbell*, *supra*; *Ellis v. Lochgelly Iron and Coal Co.*, *supra*.

<sup>8</sup> *Ersk.* iii. 3, 87; *Grant's Trs. v. Morison*, 1875, 2 R. 377; *Glasgow Feuing and Building Co. v. Watson's Trs.*, 1887, 14 R. 610; *Jamieson v. M'Innes*, 1887, 15 R. 17; *Wilkie v. Hamilton Lodging House Co.*, 1902, 4 F. 951; *M'Laren on Wills*, 3rd ed., i. 359.

<sup>9</sup> *Coutts v. Allan*, 1758, Mor. 11549; *Mags. of Dundee v. Duncan*, 1883, 11 R. 145; *Glen's Trs. v. Lancashire, etc., Insurance Co.*, 1906, 8 F. 915; *Gordon's Trs. v. Eglinton*, 1851, 13 D. 1381; *Johnston v. Pettigrew*, 1865, 3 M. 954.

<sup>10</sup> *Glen's Trs. v. Lancashire, etc., Insurance Co.*, *supra*.



the errors may be rectified.<sup>1</sup> Where certain formalities are necessary to the validity of a deed, and these have been omitted, the Court, however, will not supply them.<sup>2</sup> Where a party to a contract founds on an alleged clerical error, and this is not admitted by the other party, mistake has in certain cases been established by extrinsic proof.<sup>3</sup>

SUBSECTION (2).—*Where Rights of Third Parties are involved.*

**601.** Even when the rights of third parties are involved errors can still be corrected unless prevented by the law relating to negotiable instruments.<sup>4</sup> Correction is not possible where in a question of heritable property a third party relies on the sanctity of recording in the Register of Sasines. Thus a mistake in a written description of certain subjects, which can be rectified in a question between the seller and purchaser, cannot be rectified where the rights of a singular successor are concerned.<sup>5</sup> A singular successor, however, is not entitled to rely on the records with regard to personal obligations. Thus, where in a feuing plan attached to a conveyance, certain proposed roads were shewn coloured brown, and in the missives preceding the conveyance the superior agreed to make these roads, a singular successor of the disponee was unable to prevent the superior from shewing that the roads on the plan had been coloured by mistake and partially reducing the original contract.<sup>6</sup>

SECTION 4.—REFORMING THE CONTRACT.

**602.** It has been laid down that the Scottish Courts have no power to alter and rectify a contract so as to reconcile it with the true intention of parties. "There is no such process in Scotland. An agreement must either be upheld altogether or set aside altogether. No action will lie for having it set straight, or reformed, as we call it, between the parties."<sup>7</sup> The law in Scotland is said to differ from that of the Chancery Courts in England, but the margin of difference is in effect, it is submitted, not important.<sup>8</sup>

SECTION 5.—ERROR IN EXPRESSION.

**603.** A party who, when making an offer, makes a mistake in its terms, either verbal or written, is not bound by it if the acceptor was

<sup>1</sup> *Neill v. Midland Rly. Co.*, 1869, 20 L.T. 864.

<sup>2</sup> *Johnston v. Pettigrew*, 1865, 3 M. 954; *Macdonald v. Macdonald*, 1875, 2 R. (H.L.) 28.

<sup>3</sup> *Waddell v. Waddell*, 1863, 1 M. 635; *M'Laren v. Liddell's Trs.*, 1862, 24 D. 577.

<sup>4</sup> *North British Insurance Co. v. Tunnock*, 1864, 3 M. 1.

<sup>5</sup> *Mansfield v. Walker's Trs.*, 1835, 1 Sh. & M'L. 203.

<sup>6</sup> *Glasgow Feuing and Building Co. v. Watson's Trs.*, 1887, 14 R. 610.

<sup>7</sup> *Inglis v. Buttery & Co.*, 1878, 5 R. (H.L.) 87, per Lord Hatherley at p. 96; and see *Pender-Small v. Kinloch's Trs.*, 1917 S.C. 307.

<sup>8</sup> *Waddell v. Waddell*, *supra*; *Dumbarton Steamboat Co. v. Macfarlane*, 1899, 1 F. 993; *Krupp v. Menzies*, 1907 S.C. 903; *Mulvein v. Murray*, 1908 S.C. 528; *Mackenzie v. Coulson*, 1864, L.R. 839; *Baker v. Hedgcock*, 1888, 39 Ch. D. 520; *May v. Platt*, [1900] 1 Ch. 616.

aware of the mistake, or where the mistake must have been obvious. Thus a party made an offer to sell a particular piece of property at a price of £1100; this sum had been arrived at by him owing to a mistake made in addition; the offer was accepted, but a reply notifying that the mistake had been made was immediately sent; and the acceptor, who must have been aware of the existence of the mistake, was held not entitled to compel the offerer to implement his contract.<sup>1</sup> In certain cases it has been held that a party is not entitled to enforce his acceptance of an offer if he is aware that the offer has been made under a mistake in fact on the part of him who has made it. Where land was sold under the belief by the party offering that it was burdened with a heavy feu-duty, and the acceptor knew that the feu-duty exigible was quite small, the contract was reduced.<sup>2</sup> Such cases are, however, exceptional.<sup>3</sup> Where the acceptor is not aware that any error has been made in the terms of the offer, or that the party making it was in error as regards any of the facts concerned, he may insist on its acceptance and implement.<sup>4</sup>

**604.** When a contract has been accepted and cannot be enforced because of error on the part of the person making the offer, it must be reduced.<sup>5</sup> In cases where the terms of an offer or acceptance become changed in course of transmission (*e.g.* by cable), so that on reception they materially differ from those in which it was originally made, the acceptance does not conclude the contract.<sup>6</sup>

#### SECTION 6.—ERROR IN LAW AS TO EFFECT OF CONTRACT.

**605.** It is settled law that where two parties enter into obligations under contract, error on the part of one of them as to the legal effect of the contract is not a ground on which the contract may be reduced. When a party knowingly enters into a contract, it is the province of the Courts exactly to determine in what his obligations under the contract consist. Where an heir of entail offered to sell his entailed estate, the sale to be subject to the ratification of the Court, and the offer was accepted, it was held that the contract must be implemented, and that the heir was bound to apply to the Court for a “ratification” of the sale under the Entail Amendment Act, 1853, s. 5, notwithstanding that he was in error as to the legal effect of the agreement he had entered into.<sup>7</sup> Where a pursuer averred that she did not understand the legal effect

<sup>1</sup> *Webster v. Cecil*, 1861, 30 Beav. 62; *Phillips v. Bistolli*, 1824, 2 B. & C. 511; *May v. Platt*, [1900] 1 Ch. 616.

<sup>2</sup> *Stewart's Trs. v. Hart*, 1875, 3 R. 192; *Moncrieff v. Lawrie*, 1896, 23 R. 577.

<sup>3</sup> *Smith v. Hughes*, 1871, 6 Q.B. 597.

<sup>4</sup> *Seaton Brick and Tile Co. v. Mitchell*, 1900, 2 F. 550; but see *Jamieson v. M'Innes*, 1887, 15 R. 17; *Wilkie v. Hamilton Lodging House Co.*, 1902, 4 F. 951.

<sup>5</sup> *Stewart's Trs. v. Hart*, 1875, 3 R. 192; *Boyd & Forrest v. Glasgow and South-Western Rly. Co.*, 1915 S.C. (H.L.) 20.

<sup>6</sup> *Verdin Bros. v. Robertson*, 1871, 10 M. 35; *Henkel v. Pape*, 1870, L.R. 6 Ex. 7.

<sup>7</sup> *Stewart v. Kennedy*, 1890, 17 R. (H.L.) 25.

of obligations she had entered into with a building society, the same principle that such error could not affect the contract was applied.<sup>1</sup>

**606.** This principle does not so strictly apply when fiduciary relations exist between the parties, and has no application (a) in cases of repetition of money paid in error (*condictio indebiti*); (b) in cases of election by a widow to accept or refuse her legal rights. Such cases are not regarded as in the nature of ordinary contracts. If the widow makes her election after being separately and fully advised, she cannot withdraw it,<sup>2</sup> yet if she be in error as to the results of her election at the time she makes it, she may have a good ground of reduction, although there has been no misrepresentation made to her;<sup>3</sup> (c) in cases where obligations are entered into gratuitously. A testator appointed a university court as trustees under a will in which his estate was destined for certain charities; the testator's sole representative *ab intestato* was his sister, and she gave the trustees a deed of confirmation and assignation under which she renounced all rights to her brother's estate. An issue was allowed that the deed was granted by her under essential error, the Court proceeding on the ground that the deed was gratuitous.<sup>4</sup>

#### SECTION 7.—ERROR AS TO EXTERNAL FACTS.

**607.** The validity of a contract is not affected where one of the parties has been in error as to some external circumstance, and avers that he would not have entered into the contract if he had not been in error thereanent. A reduction of a deed of entail was brought on two grounds: (1) that the pursuer had signed it under error as to the provisions of a previous deed; and (2) that he had signed in ignorance that a material clause, which had been included when the draft was revised, was not present in the final copy. An issue of essential error was allowed on the second ground, but not on the first, the first ground being error merely affecting motive, but the second being regarded as error as to the identity of the whole document.<sup>5</sup> Where a pursuer dealing directly with defenders settled a claim for £20, not knowing that a tender had been lodged in Court for £50, the settlement was not allowed to be set aside.<sup>6</sup> Where, however, the error has been induced, it may be innocently by the other party to the contract, the party who has been in error can recover any loss sustained by him.<sup>7</sup>

<sup>1</sup> *Laing v. Provincial Homes Investment Co.*, 1909 S.C. 812; and see *Muirhead & Turnbull v. Dickson*, 1905, 7 F. 686.

<sup>2</sup> *Dawson's Trs. v. Dawson*, 1896, 23 R. 1006.

<sup>3</sup> M'Laren on Wills and Succession, 3rd ed., i. 249; *Dawson's Trs. v. Dawson*, *supra*; *M'Fadyen v. M'Fadyen's Trs.*, 1882, 10 R. 285.

<sup>4</sup> *M'Caig v. University of Glasgow*, 1904, 6 F. 918; and see *M'Laurin v. Stafford*, 1875, 3 R. 265; *Purdon v. Rowat's Trs.*, 1856, 19 D. 206; *Sawrey-Cookson v. Sawrey-Cookson's Trs.*, 1905, 8 F. 157; *Armour v. Glasgow Royal Infirmary*, 1909, 1 S.L.T. 40; *Macandrew v. Gilhooley*, 1911 S.C. 448, per Lord Ardwall at p. 453; *Hood v. Mackinnon*, [1909] 1 Ch. 476.

<sup>5</sup> *Hogg v. Campbell*, 1864, 2 M. 848.

<sup>6</sup> *Welsh v. Cousin*, 1899, 2 F. 277; and see *Bennie's Trs. v. Couper*, 1890, 17 R. 782.

<sup>7</sup> *Duncan, Galloway & Co. v. Duncan, Falconer & Co.*, 1913 S.C. 265.



## SECTION 8.—MUTUAL ERROR IN CONTRACT.

SUBSECTION (1).—*Mutual Error as to Facts.*

**608.** Where parties contract presupposing that a certain state of facts exists, and their presupposition has been erroneous, the contract may be reduced. It is implied that one of the essential conditions of the contract is the existence of facts as understood in the mind of both parties when they enter into their obligations. It is statutorily provided that "where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."<sup>1</sup> Where parties bought and sold a cargo believed to be in transit, whereas in fact it had already been destroyed, the contract was held void *ab initio*.<sup>2</sup> An assignment of a policy of life insurance executed when the insured, unknown to both parties, was already dead is void.<sup>3</sup> Where parties contract for the sale of a piece of land, both being under the belief that it belongs to the seller, whereas in fact a small part of it belongs to a third party, the contract may be reduced on the ground of essential error<sup>4</sup> if the seller has disclaimed any warrandice of title. A contract of sale is void when the purchaser contracts to buy something which, unknown to himself and the seller, already belongs to him.<sup>5</sup>

SUBSECTION (2).—*Discharge under Mutual Error.*

**609.** A discharge granted and taken may be reduced on the ground of mutual error. Where one person, in contract with another, renounced a share in a third person's estate, on the assumption that the share had not yet vested, whereas it had vested, it was held that the discharge could be reduced;<sup>6</sup> and where one person had granted a general discharge in favour of another in consideration of payment of a specific amount, both parties being under the erroneous belief that the amount was all that could be claimed, the discharge was held not binding.<sup>7</sup>

SUBSECTION (3).—*Mutual Error as to Probabilities.*

**610.** If the mutual error is one of opinion only, the validity of the contract cannot be challenged. Contracts of risk cannot be reduced on the ground that matters turned out to be different to what was expected. Thus heritable estate was sold which was burdened with an

<sup>1</sup> Sale of Goods Act, 1893, s. 6.

<sup>2</sup> *Couturier v. Hastie*, 1856, 5 H.L.C. 573; and see *Sibson & Kerr v. Ship "Barcraig" Co.*, 1896, 24 R. 91.

<sup>3</sup> *Cochrane v. Wills*, 1865, L.R. 1 Ch. 58; *Scott v. Coulson*, [1903] 2 Ch. 249.

<sup>4</sup> *Hamilton v. Western Bank*, 1861, 23 D. 1033; and see *Grieve v. Wilson*, 1833, 6 W. & S. 543; *Huddersfield Banking Co. v. Lister*, [1895] 2 Ch. 273.

<sup>5</sup> *Caledonian Rly. Co. v. Symington*, 1911 S.C. 552.

<sup>6</sup> *Mercer v. Anstruther's Trs.*, 1871, 9 M. 618.

<sup>7</sup> *Leslie v. M'Leod*, 1870, 8 M. (H.L.) 99.

annuity of £50, which was to subsist so long as there was a church of a certain description in a parish: at the time of the disposition both parties were aware that until a judgment was pronounced in the House of Lords, it was uncertain whether the church was of that description or not; as a result of the decision, no church of that description existed; the vendors were held not entitled to repayment of the capitalised annuity on two grounds, one of which was that there had been no error, and the other that reduction of the whole contract was the only competent remedy.<sup>1</sup> In cases under the Workmen's Compensation Acts it is not a good ground of reduction that the signatory of a discharge relied on a medical report which afterwards turned out to be wrong.<sup>2</sup> Similarly a sale cannot be reduced on the ground that the object sold has a value unknown to both parties at the time of the sale.<sup>3</sup>

SUBSECTION (4).—*Mutual Error leading to Compromise.*

**611.** A compromise is not reducible on the ground that one or both parties to it were in error. This rule holds good even in cases where one party puts forward a claim to which there can be no valid objection.<sup>4</sup> Where, however, the Court is a party to the transaction, which is of the nature of a compromise, the rule does not hold. If in a liquidation which is subject to the supervision of the Court the sanction of the Court has been obtained to a compromise without the Court being informed of a material fact, the decree sanctioning the compromise is reducible.<sup>5</sup> But in cases concerning the settlement of disputed family affairs, a compromise is not to be reduced on the ground of error,<sup>6</sup> at least where the parties in dispute are separately advised.<sup>7</sup> In an agreement for compromise the consideration which each party receives is the settlement of the dispute, and it is no objection to the validity of such contract that the right was in one of the parties only.<sup>8</sup> See COMPROMISE.<sup>9</sup>

<sup>1</sup> *Pender-Small v. Kinloch's Trs.*, 1917 S.C. 307.

<sup>2</sup> *M'Guire v. Paterson & Co.*, 1913 S.C. 400; *Park v. Anderson Bros.*, 1924 S.C. 1017; *Dornan v. Allan & Son*, 1900, 3 F. 112.

<sup>3</sup> *Dawson v. Muir*, 1851, 13 D. 843.

<sup>4</sup> *Stair*, i. 17, 2.

<sup>5</sup> *D. & W. Henderson & Co. v. Stewart*, 1894, 22 R. 154.

<sup>6</sup> *Kippen v. Kippen's Trs.*, 1874, 1 R. 1171.

<sup>7</sup> *In re Roberts*, [1905] 1 Ch. 704.

<sup>8</sup> *Trigge v. Lavallée*, 1862, 15 Moore P.C. 271.

<sup>9</sup> Vol. IV. p. 255, *ante*.

## ESCAPE OF PRISONER.

*See* CRIME.

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## ESCHEAT.

*See* CRIME (PUNISHMENT).

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## ESQUIRE.

*See* PRECEDENCE.



# ESTATE AND OTHER DEATH DUTIES.

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## PART I.—INTRODUCTORY AND GENERAL.

## SECTION 1.—GENERAL SCHEME OF THE BRITISH DEATH DUTIES.

**612.** The modern British Death Duties, which are now payable throughout England and Scotland, fall within two distinct categories.

The first category is represented by the Estate Duty, a duty in the nature of a transfer or mutation duty payable by reason of the passing of property on death; the second category is represented alternatively by the Legacy Duty or the Succession Duty, each of which is a duty in the nature of an acquisition or receipt duty payable by reason of the receipt by a beneficiary of property subsequently to the death of its previous owner or liferenter.

Estate Duty is, in theory, an impersonal duty primarily founded on a territorial basis, being leviable in respect of all property situate in Great Britain passing on death, merely by reason of the fact that the property so passes; but it is never leviable in respect of immoveable property, as such, situate outside Great Britain, and it is only leviable in respect of moveable property so situate either when the owner was domiciled in Great Britain, or the forum of the trust to which the property is subject is British. Its rates are not founded on any personal considerations, but are regulated by a scale increasing in severity as the aggregate capital value of the property chargeable becomes greater.

On the other hand, Legacy Duty and Succession Duty are, in theory, personal duties, being leviable by reason of the gratuitous receipt by a person of property after such property has passed on the death of its previous full or limited owner. As regards Succession Duty in respect of immoveable property, the duty is only leviable when the property, the subject of the beneficial acquisition, is situate in Great Britain. But as regards both Succession Duty in respect of moveable property and Legacy Duty, the duty is leviable either when the forum of the trust to which the property is subject is British, or when the deceased testate or intestate owner was domiciled in Great Britain, in each case regardless of the actual situation of the property. The rates of each of these duties, in contradistinction to the Estate Duty rates, are founded on a consanguinity basis, increasing in severity as the relationship between the author and the recipient of the bounty becomes more remote.

**613.** The present scheme of British death duty taxation has been evolved from a system which, at varying periods, has comprised no less than seven separate duties. Four of such duties have now been discontinued, but as these may still be payable in relation to deaths occurring during certain given periods, it will, perhaps, be well to give a short historical retrospect of all the duties in question before considering in detail the law by which the existing duties are governed.

## SECTION 2.—HISTORICAL RETROSPECT.

### SUBSECTION (1).—*Inventory Duty.*

**614.** The existing British Estate Duty owes its origin to the English Probate Duty which, as first introduced as a public tax in England in the year 1694,<sup>1</sup> was in the nature of a stamp duty in respect of the move-

<sup>1</sup> By 5 & 6 Will. & Mary, c. 21, an Act of the English Parliament, since repealed.



able property to be covered by an English grant of representation, the payment of the duty being evidenced by stamps embossed on the relative probate or letters of administration. No tax of this nature was imposed in Scotland until the year 1804,<sup>1</sup> when a stamp duty (exactly corresponding to the English Probate Duty) was made payable upon every testament testamantar, or testament dative, or eik thereto, to be expedite in any Commissary Court in Scotland. Owing, apparently, to the practice then obtaining in Scotland of administering so far as possible without confirmation, the yield of this Scottish tax did not reach expectations, notwithstanding that the exhibition of a full inventory detailing the estate to be administered was made compulsory, and it was in these circumstances that, in 1808, the stamp denoting the payment of the duty, as imposed by the Act of 1804, was transferred from the confirmation itself to the inventory.<sup>2</sup> Henceforward this duty (which, until its repeal in 1894, remained the exact counterpart of the English Probate Duty and is always treated as one with that duty) was known as the Inventory Duty. The sums payable for this duty were revised from time to time, but when, in 1881, the English Probate Duty was remodelled somewhat on the line adopted in Scotland for the Inventory Duty in 1804, the duty was made payable at (practically) a flat rate of 3 per cent. on the net value of the moveable estate.<sup>3</sup>

**615.** Inventory Duty was, originally, payable only in respect of the free moveable estate of a deceased person situate in Scotland. But in 1858 provision was made (when the deceased died domiciled in Scotland) for the inclusion in the inventory also of English and Irish personalty and for payment of the duty on the whole of the moveable estate situate in the United Kingdom (as then constituted).<sup>4</sup> On this course being followed the relative confirmation became effective in England or Ireland merely by being produced to the English or Irish Court and sealed there. The Finance Act, 1894,<sup>5</sup> in repealing the levy both of the Scottish Inventory Duty and of the English Probate Duty in regard to deaths happening after the 1st August 1894, in a very large measure continued the then existing law as applying to those two duties to the Estate Duty introduced by that Act. All the relative features of the Inventory Duty, so far as they have been retained in the Estate Duty, will accordingly

<sup>1</sup> Stamp Act, 1804 (44 Geo. III. c. 98), since repealed.

<sup>2</sup> Probate and Legacy Duty Act, 1808 (48 Geo. III. c. 149). The relative sections of this Act are still operative. See further hereon, paras. 721 and 722, *infra*.

<sup>3</sup> Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12).

<sup>4</sup> By the Confirmation of Executors (Scotland) Act, 1858 (21 & 22 Vict. c. 56), ss. 9, 12, and 13. Sec. 12 of this Act has now been replaced by s. 168 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. V. c. 49). Sec. 13 now operates in regard to the whole of Ireland only in the case of deaths prior to the 22nd November 1921, and in regard to Southern Ireland or the Irish Free State only in the case of deaths prior to the 1st April 1923. In regard to Northern Ireland, s. 13 only operates (i) in the case of deaths between the 21st November 1921 and the 1st April 1923, subject to the Government of Ireland (Resealing of Probates, etc.) Order, 1922 (S.R. & O., 1922, No. 81), and (ii) in the case of deaths on and since the 1st April 1923, subject to the Government of Ireland (Resealing of Probates, etc.) Order, 1923 (S.R. & O., 1923, No. 613).

<sup>5</sup> 57 & 58 Vict. c. 30.

be considered below in Part II. hereof. Inventory Duty still requires to be paid in the case of deaths before 2nd August 1894, and Form H, issued by the Estate Duty Office, Edinburgh, contains instructions which are of assistance in compiling the (manuscript) inventory requiring to be lodged.

#### SUBSECTION (2).—*Account Duty.*

**616.** This duty was imposed by the Customs and Inland Revenue Act, 1881,<sup>1</sup> and was in the nature of an Inventory Duty in respect of moveable property devolving on or with reference to death under a gratuitous title, other than the will or intestacy of the deceased, *e.g.* gifts and voluntary settlements. It was charged at the same rate as the remodelled Inventory Duty of 1881 and remains payable only in relation to deaths occurring between 31st May 1881 and 2nd August 1894, the levy having been repealed by the Finance Act, 1894.<sup>2</sup> The principal features of this duty have all been retained in the Estate Duty and will be considered below in Part II. hereof.

#### SUBSECTION (3).—*Temporary Estate Duty.*

**617.** This duty was imposed by the Customs and Inland Revenue Act, 1889,<sup>3</sup> and was in the nature of a super-tax in respect of large estates. It was payable (1) in addition to Inventory Duty in the case of every inventory exhibited subsequent to 31st May 1889 where the net value of the moveable property exceeded £10,000; (2) in addition to Account Duty where the value of the property in an account for the assessment of that duty, delivered after 31st May 1889, exceeded £10,000; and (3) in addition to Succession Duty where the value of a succession upon a death after 31st May 1889, liable to Succession Duty under the Succession Duty Act, 1853,<sup>4</sup> and the Customs and Inland Revenue Act, 1888,<sup>5</sup> exceeded £10,000, and also where the value of any succession to heritable property under the will or intestacy of any person so dying did not exceed £10,000, but its value together with the value of any other benefit taken by the successor under such will or intestacy did exceed £10,000. But if payable under headings (1) or (2) it was not again payable under heading (3). The rate of the duty was fixed at a flat rate of 1 per cent. It was originally imposed for a period of seven years from 1889, but was virtually abolished by the Finance Act, 1894,<sup>2</sup> in relation to deaths occurring after 1st August 1894.

#### SUBSECTION (4).—*Estate Duty.*

**618.** Estate Duty, which was imposed by the Finance Act, 1894,<sup>2</sup> superseded the Scottish Inventory Duty and the English Probate Duty, as well as the Account Duty and the Temporary Estate Duty, in relation to deaths occurring on and after 2nd August 1894. Whilst retaining

<sup>1</sup> 44 & 45 Vict. c. 12.

<sup>4</sup> 16 & 17 Vict. c. 51.

<sup>2</sup> 57 & 58 Vict. c. 30.

<sup>5</sup> 51 & 52 Vict. c. 8.

<sup>3</sup> 52 & 53 Vict. c. 7.

the general scheme of the repealed duties, it contained two special features: (1) the extension of a duty in the nature of the Inventory Duty and the Account Duty to heritable, as well as to moveable, property; and (2) the extension of the principle of the Temporary Estate Duty by the establishment of a scale of rates, increasing in severity as the capital value of the property chargeable enlarges, such capital value being arrived at by aggregating the principal value of all the property passing on the death of the deceased under whatever title the devolution took place. Estate Duty is now the principal of the British Death Duties. It is dealt with in detail in Part II. hereof.

#### SUBSECTION (5).—*Settlement Estate Duty.*

**619.** This duty was imposed by the Finance Act, 1894,<sup>1</sup> and was abolished by the Finance Act, 1914.<sup>2</sup> It was a supplementary Estate Duty payable (at first at 1 per cent. and later at 2 per cent.)<sup>3</sup> on the first devolution by reason of death under a will or settlement of settled property. Its payment operated to exempt the settled property in question from liability to Estate Duty on all subsequent passings by death during the course of the particular settlement. On its abolition by the Finance Act, 1914,<sup>2</sup> provision was made that on the first occasion on which Estate Duty should become payable in respect of any settled property (where such duty would not have been payable but for the provisions of that Act), the amount of the Settlement Estate Duty, if any, paid in respect of that property should be allowed against the amount of the Estate Duty payable on that occasion, and if it exceeded that amount, the excess was to be repaid to the estate. Further, interest on the amount of the Settlement Estate Duty, from the 15th August 1914 up to the date of the occasion, was made payable to the several persons, or their representatives, who would have been entitled to the income arising from that amount, if, on 15th August 1914, it had been added to the capital of the settled property.<sup>4</sup> Where Settlement Estate Duty has been paid in respect of a settlement which was merely contingent, and it is afterwards shewn that the contingency has not arisen and cannot arise, the duty is repayable in terms of s. 14 of the Finance Act, 1898,<sup>5</sup> in the case of a death after 1st July 1898.<sup>6</sup>

#### SUBSECTION (6).—*Legacy Duty.*

**620.** The first imposition in Great Britain of a death duty in the nature of an acquisition duty was effected in the year 1780,<sup>7</sup> when a receipt duty, regulated by a scale varying with the amount of the

<sup>1</sup> 57 & 58 Vict. c. 30.

<sup>2</sup> 4 & 5 Geo. V. c. 10.

<sup>3</sup> Finance (1909–10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 54.

<sup>4</sup> See para. 710, *infra*.

<sup>5</sup> 61 & 62 Vict. c. 10.

<sup>6</sup> *Watherston's Trs. v. Lord Advocate*, 1901, 3 F. 429.

<sup>7</sup> By 20 Geo. III. c. 28, since repealed.



benefit, was made payable on all receipts given to administrators and executors upon the payment of legacies. The scheme of the duty was, however, entirely remodelled in 1796,<sup>1</sup> when it was imposed as a tax on the property itself and was regulated by a scale of rates increasing in amount as the relationship between the testator or intestate and the beneficiary became more remote. To this day Legacy Duty has remained on this basis and the Act of 1796 still remains the leading authority for its charge. It should, however, be noted that that Act makes the duty payable only in respect of personal or moveable property, and that it was not until 1805<sup>2</sup> that the proceeds of sale of heritable estate were included in its charge.<sup>3</sup> This duty, it should be observed, is founded solely on a personal (and not on a territorial) basis. For the local situation of the property is quite immaterial, and the primary essential to make the duty payable is that the deceased testator or intestate should have died domiciled in Great Britain. If this condition obtains the duty is payable regardless of the locality of the personal or moveable property of the deceased.<sup>4</sup> Legacy Duty is to-day of considerable importance and is dealt with in detail below in Part III. hereof.

#### SUBSECTION (7).—*Succession Duty.*

**621.** Succession Duty was imposed in the year 1853<sup>5</sup> and may be defined as a duty complementary to Legacy Duty. For it carried the principle of that duty to all heritable property devolving under a will or intestacy, as well as to all gratuitous acquisitions of property on death acquired otherwise than under the will or intestacy of the deceased. In thus extending to moveable and immoveable property, whether settled or not settled, the liability to an acquisition duty, it may be said to have effected, in this field of taxation, an extension similar to that effected by Estate Duty in the year 1894 in the field of duties in the nature of Inventory Duty or Account Duty. The rates of Succession Duty are fixed on a scale corresponding to the rates of Legacy Duty. Succession Duty, with respect to the sum collected, is the least important of the existing British Death Duties; but it is a necessary complementary link in their chain and is considered in detail below in Part IV. hereof.

### SECTION 3.—MANAGEMENT OF THE DUTIES.

**622.** Inventory Duty and Legacy Duty were originally placed under the management of the Commissioners of Stamps, who, after consolida-

<sup>1</sup> By the Legacy Duty Act, 1796 (36 Geo. III. c. 52).

<sup>2</sup> Legacy Duty Act, 1805 (45 Geo. III. c. 28).

<sup>3</sup> By the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 21, legacies payable out of the proceeds of heritable estate are now charged with Succession Duty and not with Legacy Duty.

<sup>4</sup> This was finally settled by the House of Lords in *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1.

<sup>5</sup> Succession Duty Act, 1853 (16 & 17 Vict. c. 51).

tion first with the Commissioners for the Affairs of Taxes and later with the Commissioners of Excise, became in 1849<sup>1</sup> the Commissioners of Inland Revenue. The collection, recovery, and management of the death duties leviable in Great Britain has, ever since 1849, remained in these Commissioners, who have appointed a special office in the Inland Revenue Department, called the Estate Duty Office, to deal with the duties in question. Any enquiries as to these duties should be addressed, in Scotland, to the Registrar, Estate Duty Office, Inland Revenue, Waterloo Place, Edinburgh; or, in England, to the Controller, Estate Duty Office, Inland Revenue, Somerset House, London, W.C. 2.

**623.** From 1849 to 1921 the jurisdiction of the Commissioners of Inland Revenue extended to the death duties leviable both in Great Britain and Ireland, all of which duties, since the amalgamation of the British and Irish Exchequers in the year 1817, had been paid into the United Kingdom Exchequer, and since 1842 had been unified into one synchronised system.<sup>2</sup> It is, however, material to note that the jurisdiction of the Commissioners of Inland Revenue, in relation to death duties, is now limited to the duties leviable in Great Britain only, the duties leviable in the whole of Ireland being now, once again, completely separate and distinct from those leviable in Great Britain.

**624.** The death duties leviable in Northern Ireland were made separate and distinct from those in the rest of the United Kingdom (as then constituted) on the 22nd November 1921, in relation to deaths occurring on and after that date. This change was made effective by an Order in Council<sup>3</sup> under the provisions of the Government of Ireland Act, 1920.<sup>4</sup> This Order arranged how duty unpaid on the 22nd November 1921 should be collected, as between Northern Ireland on the one hand, and the rest of the United Kingdom (as then constituted) on the other. It also adapted the then existing Death Duties Acts of the United Kingdom Parliament, in relation to deaths on and after that date, respectively: (1) for use in Northern Ireland, and (2) for use in the rest of the United Kingdom (as then constituted). The Commissioners of Inland Revenue have, accordingly, no further concern as regards the death duties payable in Northern Ireland in relation to deaths occurring since the 21st November 1921, which duties are now subject to the jurisdiction of the Northern Irish Parliament.

**625.** As regards Ireland, other than Northern Ireland, one unified system continued in force with Great Britain in relation to deaths occurring before the 1st April 1923. But the management of that system, so far as it related to the collection of duty in Southern Ireland,

<sup>1</sup> Inland Revenue Board Act, 1849 (12 & 13 Vict. c. 1). Since repealed and replaced by the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21).

<sup>2</sup> This was first effected by the Stamp Duties (Ireland) Act, 1842 (5 & 6 Vict. c. 82), as a temporary measure. The permanent assimilation was effected by the Stamp Act, 1853 (16 & 17 Vict. c. 59).

<sup>3</sup> The Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80).

<sup>4</sup> 10 & 11 Geo. V. c. 67.

passed, on the 1st April 1922, from the Commissioners of Inland Revenue to the Ministry of Finance of the Provisional Southern Irish Government then set up. This change was made effective by an Order in Council <sup>1</sup> under the provisions of the Irish Free State (Agreement) Act, 1922.<sup>2</sup> This Provisional Government was succeeded, on the 6th December 1922, by the Government of the Irish Free State, and the management of the unified system above referred to then devolved on the Revenue Commissioners of that State. The continuation of that system in relation to deaths occurring before the 1st April 1923 was expressly provided for by s. 2 of the Irish Free State Constitution Act, 1922,<sup>3</sup> and Article 74 of the Constitution of the Irish Free State,<sup>4</sup> and it is, accordingly, only in relation to deaths occurring on and since the 1st April 1923 that separate and distinct systems of death duty taxation have come into force respectively in Great Britain and the Irish Free State. The Provisional Government (Transfer of Functions) Order, 1922,<sup>1</sup> arranged how duty unpaid on the 1st April 1922 should be collected as between Southern Ireland on the one hand, and Great Britain on the other, and further adaptations of the United Kingdom Death Duty Acts in their application to *post*-March 1923 British duties, where the death occurred on or after the 1st April 1923, were made by the Irish Free State (Consequential Adaptation of Enactments) Order, 1923.<sup>5</sup>

**626.** It will thus be noted that three separate and entirely distinct systems of death duty taxation are now in force in Great Britain and Ireland: (1) the Northern Irish system, which is subject to the jurisdiction of the Northern Irish Parliament; (2) the Irish Free State system, which is subject to the jurisdiction of the Irish Free State Parliament; and (3) the British system, which is subject to the jurisdiction of the United Kingdom Parliament, and is placed by that Parliament under the management of the Commissioners of Inland Revenue. It is with the British duties only that this article is concerned.

#### SECTION 4.—CONSTRUCTION OF STATUTES.<sup>6</sup>

**627.** As taxing Acts, the Statutes imposing death duties are strictly construed, and as Viscount Cave has remarked in this connection: "Regard must be had not to what one might expect to find in the Act,

<sup>1</sup> The Provisional Government (Transfer of Functions) Order, 1922 (S.R. & O., 1922, No. 315).

<sup>2</sup> 12 & 13 Geo. V. c. 4.

<sup>3</sup> 13 Geo. V. c. 1.

<sup>4</sup> Reproduced in a schedule to the Irish Free State Constitution Act, 1922 (13 Geo. V. c. 1).

<sup>5</sup> S.R. & O., 1923, No. 405, an Order made under the authority of the Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. V. c. 2).

<sup>6</sup> An exhaustive collection of the statutes relating to death duties is published by H.M. Stationery Office under the title of "British Death Duty Acts, 1796 to 1924," and kept up to date by Supplements. This publication contains also the principal Statutory Rules and Orders bearing upon the death duties.



but to the words of the Act themselves.”<sup>1</sup> On the other hand, the “scheme of the Act” may be looked at,<sup>2</sup> and “the expressions used must be given fair play.”<sup>3</sup> They apply in the main to England and Scotland alike, but the phrasing of certain of their provisions, however apt it may be in questions of English law, is sometimes not easily applied to the Scottish legal system, and not in all instances is there an application clause in aid. In such a case, the Scottish Court “must do its best to give effect to the meaning of the statute, not by treating English law terms as unmeaning symbols, but as terms which, although not terms of art in Scotland, may be taken as words of ordinary popular signification, and as such are capable of application to the Scottish system.”<sup>4</sup> A provision may, nevertheless, have a different application as between England and Scotland in circumstances where the divergence of the legal systems is such as to involve a fundamental difference in the rights of parties, *e.g.* the case of donation between spouses in which a Scottish spouse had, until recently, a right of revocation and disposal which an English spouse did not possess. This, however, does not involve the construction of the relevant fiscal statute in any different sense for Scotland or “infer inequality (of taxation) any more than does the proposition that such a donation is revocable in the one country and not in the other.”<sup>5</sup> In considering questions as to the incidence of death duties, the Courts regard “the substance of the transaction” rather than the forms of conveyancing adopted.<sup>6</sup>

#### SECTION 5.—COMPOSITION OF DEATH DUTIES.

**628.** Where, by reason of the number of deaths on which property has passed, or of the complicated nature of the interests of different persons therein, or from any other cause, it is difficult to ascertain exactly the amount of death duties payable or so to ascertain the same without undue expense, the Commissioners are empowered, on the application of any person accountable for any duty and on his giving them all the information in his power respecting the amount of the property and the several interests therein, and other circumstances of the case, to assess, by way of composition for all or any of the duties payable, such sum as appears proper, and to accept payment thereof in full discharge of all claims for death duties and give a certificate of discharge accordingly.<sup>7</sup>

<sup>1</sup> In *Nevill v. Inland Revenue Commrs.*, [1924] A.C. at p. 399.

<sup>2</sup> Per Lord Halsbury in *Inland Revenue Commrs. v. Priestley*, [1901] A.C. at p. 213.

<sup>3</sup> Per Lord Dunedin in *Attorney-General v. Milne*, [1914] A.C. at p. 778.

<sup>4</sup> Per Lord Dunedin in *Lord Advocate v. Countess of Moray*, [1905] A.C. at p. 544.

<sup>5</sup> Per Lord Pearson in *Lord Advocate v. Gunning's Trs.*, 1907 S.C. at p. 810.

<sup>6</sup> Per Lord Mackenzie in *Lord Advocate v. Lyell*, 1918 S.C. at p. 133; and see also Lord Atkinson in *Lethbridge v. Attorney-General*, [1907] A.C. at p. 26; Pollock M.R. in *Attorney-General v. Parr*, [1924] 1 K.B. at p. 927 (C.A.); and Rowlatt J. in *Attorney-General v. Public Tr.*, [1920] 3 K.B. at p. 685.

<sup>7</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13 (1).

SECTION 6.—SATISFACTION OF DUTIES OTHERWISE THAN BY  
PAYMENT IN CASH.

SUBSECTION (1).—*Transfer of Land.*

**629.** The Commissioners may, if they think fit, on the application of any person liable to pay Estate Duty or Settlement Estate Duty or Succession Duty in respect of any heritable property, accept in satisfaction of the whole or any part of the duty such part of the property as may be agreed upon between the Commissioners and that person.<sup>1</sup> No Stamp Duty is payable on any such conveyance of land to the Commissioners.<sup>2</sup>

SUBSECTION (2).—*Transfer of Approved War Securities.*

**630.** In terms of Regulations<sup>3</sup> made under powers conferred on the Treasury by s. 34 of the Finance Act, 1917,<sup>4</sup> to prescribe as securities to be accepted in payment of any death duty any stock or bonds forming part of any issue made for raising money in connection with the late war, the Commissioners are empowered to accept, subject to the conditions imposed,<sup>5</sup> various securities of which those still available are 4 per cent. and 5 per cent. National War Bonds 1928 and 1929; 4 per cent. War Loan 1929–42 Stock and Bonds; 5 per cent. War Loan 1929–47 Stock and Bonds; 4 per cent. Funding Loan 1960–90, and 4 per cent. Victory Bonds. The stock or bonds are deemed to mature for payment on the date of transfer, and are valued at the price of issue,<sup>6</sup> or at such other price as was specified in the prospectus of issue,<sup>7</sup> with the addition of any interest accrued due at the date of transfer but then remaining unpaid, after deducting the amount of any interest which may be receivable by the transferor after that date. The surrender values under the above provisions of the various securities acceptable are as follows: 5 per cent. War Loan 1929–47, 95 per cent.; 4 per cent. Funding Loan 1960–90, 80 per cent.; all other securities (including 4 per cent. Victory Bonds issued at 85 per cent.) 100 per cent.

SECTION 7.—INTEREST ON DUTIES.

**631.** Interest is payable upon all death duties in arrear,<sup>8</sup> and is recoverable in the same way as the duty.<sup>9</sup> The rate was fixed in 1896<sup>9</sup>

<sup>1</sup> Finance (1909–10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 56 (1), and Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23 (9).

<sup>2</sup> Finance (1909–10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 56 (2).

<sup>3</sup> The Regulations are contained in the Death Duties, etc. (Payment in Securities) Regulations (No. 2), 1918, 1919, and (No. 2) 1919, and 1921, published as Statutory Rules and Orders, Nos. 1045 of 1918, 122 and 1353 of 1919, and 850 of 1921. These are printed in full in "British Death Duty Acts, 1796 to 1924," referred to in Note to para. 627.

<sup>4</sup> 7 & 8 Geo. V. c. 31.

<sup>5</sup> *Vide* said Regulations.

<sup>6</sup> Finance Act, 1917 (7 & 8 Geo. V. c. 31), s. 34 (3).

<sup>7</sup> Finance Act, 1918 (8 & 9 Geo. V. c. 15), s. 42.

<sup>8</sup> Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (1) and (2).

<sup>9</sup> *Ibid.*, s. 18 (1).

at 3 per cent. without deduction of income tax, but was subsequently increased to 4 per cent. where accruing due on or after 31st July 1919.<sup>1</sup> The Commissioners may remit it when the amount appears to them to be so small as not to repay the expense and trouble of calculation and account,<sup>2</sup> and also after the expiration of twenty years from the death upon which the duties became payable.<sup>3</sup> Interest is not due by the Crown apart from agreement or express provision,<sup>4</sup> and so is only paid by the Commissioners where repayment of Estate Duty is due, owing to over-valuation by them,<sup>5</sup> or if ordered by the Court.<sup>6</sup> Interest actually paid on duty returnable is repaid along with the duty.

## SECTION 8.—REMISSION OF DUTY.

### SUBSECTION (1).—*Works of Art.*

**632.** The Treasury may remit the Estate Duty or any other death duty in respect of any such pictures, prints, books, manuscripts, works of art, or scientific collections as appear to them to be of national, scientific, or historic interest, and to be given or bequeathed for national purposes or to any university or to any county council or municipal corporation. No property, the duty on which is so remitted, is aggregated with any other property in fixing the rate of Estate Duty.<sup>7</sup> Further, objects of national, scientific, or historic interest, admitted by the Treasury to be such, passing on a death on or after 1st July 1896, and settled so as to be enjoyed in kind only, are exempt from Estate Duty so long as they are so enjoyed by a person not competent to dispose thereof.<sup>8</sup> Where the death occurred on or after 30th April 1909 the exemption applies whether the property is settled or not, and extends to objects of artistic interest, and includes Legacy Duty and Succession Duty.<sup>9</sup> The property exempted is not aggregated with other property but forms an estate by itself.<sup>8</sup> Duty becomes chargeable when the property is sold, but only in respect of the last death on which it passed,<sup>9</sup> and the person selling is accountable for the duty and requires to deliver an account within one month after the sale.<sup>10</sup> Sales, on or after 4th August 1921, to the National Gallery, British Museum, or similar national institutions, any university, county council, or municipal

<sup>1</sup> By the Finance Act, 1919 (9 & 10 Geo. V. c. 32), s. 30.

<sup>2</sup> Finance Act, 1896 (59 & 60 Vict. c. 28), s. 18 (3).

<sup>3</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (11); and Finance Act, 1907 (7 Edw. VII. c. 13), s. 13.

<sup>4</sup> *In re Gosman*, 1881, 17 Ch. D. 771 (C.A.).

<sup>5</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (12).

<sup>6</sup> *Ibid.*, s. 10 (3); cf. *Sprot's Tr. v. Lord Advocate* (O.H.), 1902, 10 S.L.T. 452.

<sup>7</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 15 (2). Bequests of this nature may be in any case exempt from Legacy Duty under the provisions of the Stamp Act, 1815 (55 Geo. III. c. 184), Schedule Part III. See Legacy Duty Exemptions, para. 782, *infra*.

<sup>8</sup> Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (1).

<sup>9</sup> Finance (1909–10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 63.

<sup>10</sup> Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20 (2).



corporation, in the United Kingdom, or the National Art Collections Fund, do not attract the duty.<sup>1</sup>

**633.** Any application under this heading should be made to the Controller, Estate Duty Office, Somerset House, London, W.C. 2, and should submit a valuation of the articles, and evidence of acceptance in the case of a bequest to a public body.

#### SUBSECTION (2).—*Deaths in War.*<sup>2</sup>

**634.** Where any person dies from wounds inflicted, accident occurring, or disease contracted, within three years before death, while on active service against an enemy, or (if the cause of death arose after 31st August 1921) on service which is of a warlike nature, or which in the opinion of the Treasury otherwise involves the same risks as active service, and was a member of H.M. Forces, and subject either to the Naval Discipline Act or to military law under Part V. of the Army Act or to the Air Force Act, the Treasury may on the recommendation of the Secretary of State or the Admiralty remit the death duties payable so as to afford total exemption in respect of the first £5000 worth of property passing to the widow, lineal ancestors, or descendants, brothers and sisters or their descendants, and to discount<sup>3</sup> the duties on any estate so passing in excess of £5000 for a period equal to the normal expectation of life of the deceased at the time of his death. This—the present position—is the result of various expansions of the more limited provisions of s. 14 (1) of the Finance Act, 1900,<sup>4</sup> by the Death Duties (Killed in War) Act, 1914,<sup>5</sup> and its amending and extending Acts,<sup>6</sup> which were originally enacted with reference to the late war, but have now been given permanence.<sup>7</sup> The Act of 1914 contained (s. 2) a further provision as to remission of the whole duties payable on the second death where the same property passed more than once by deaths caused by the war, but the provision is not applied as regards deaths from causes arising after 31st August 1921.<sup>8</sup> The benefits of the relief as regards the first £5000 are apportioned rateably amongst the persons who otherwise would bear the duties.<sup>9</sup>

**635.**—Where the “quick succession” relief afforded as regards Estate Duty by the Finance Act, 1914, s. 15,<sup>10</sup> is greater than that

<sup>1</sup> Finance Act, 1921 (11 & 12 Geo. V. c. 32), s. 44.

<sup>2</sup> As to the exemption of the property of common seamen, marines, soldiers, or airmen, whether on active service or not, see para. 671, *infra*.

<sup>3</sup> As to principle of discounting, see Death Duties (Killed in War) Act, 1914 (4 & 5 Geo. V. c. 76), s. 1 (1) (b) (ii).

<sup>4</sup> 63 & 64 Vict. c. 7.

<sup>5</sup> 4 & 5 Geo. V. c. 76.

<sup>6</sup> Finance (No. 2) Act, 1915 (5 & 6 Geo. V. c. 89), s. 46; Finance Act, 1917 (7 & 8 Geo. V. c. 31), s. 29; Finance Act, 1918 (8 & 9 Geo. V. c. 15), s. 44; Finance Act, 1919 (9 & 10 Geo. V. c. 32), s. 31; Finance Act, 1921 (11 & 12 Geo. V. c. 32), s. 43; Finance Act, 1924 (14 & 15 Geo. V. c. 21), s. 38.

<sup>7</sup> Finance Act, 1924 (14 & 15 Geo. V. c. 21), s. 38.

<sup>8</sup> *Ibid.*, s. 38 (1) and (3).

<sup>9</sup> Death Duties (Killed in War) Act, 1914 (4 & 5 Geo. V. c. 76), s. 1 (2).

<sup>10</sup> See para. 718, *infra*.

afforded by the above Acts, the relief as to Estate Duty is under the said s. 15 and not under the said Acts, but in other cases the relief under that section is excluded.<sup>1</sup>

### SUBSECTION (3).—*Old Claims.*

**636.** If any duty remains unpaid after the expiration of twenty years from a death, the Commissioners may remit it or any part thereof or any interest thereon.<sup>2</sup>

### SECTION 9.—FUNDS IN MANIBUS CURIÆ.

**637.** Under the Codifying Act of Sederunt, Book B, Chapter V, following on s. 8 (1) of the Finance Act, 1894,<sup>3</sup> s. 25 of the Legacy Duty Act, 1796,<sup>4</sup> and s. 53 of the Succession Duty Act, 1853,<sup>5</sup> it is provided that no decree, warrant, or order for payment of money consigned in name of the Accountant of Court under the Court of Session Consignation (Scotland) Act, 1895,<sup>6</sup> or for payment of any consigned money or for transfer or conveyance of any property in any process for the distribution of the estate of any deceased person pending in the Court of Session, shall issue until there is lodged with the Clerk of Court a certificate by the proper officer in the department of Inland Revenue that all Income tax, Estate Duty, Legacy Duty, Succession Duty, and any other duty payable to the Commissioners of Inland Revenue have been paid and satisfied in respect of any such property; and by Book L, Chapter III, a similar provision is made as regards processes in the Sheriff Court for the distribution of estates. The "proper officer" as regards all death duties falling to be accounted for in Scotland is the Registrar, Estate Duty Office, Edinburgh, who, on payment of all the duties required,<sup>7</sup> issues a certificate<sup>8</sup> in terms adjusted with the Clerks of Court as satisfactory to them.

### SECTION 10.—CONFIDENTIALITY.

**638.** Accounts and other documents delivered or produced to the Commissioners for revenue purposes are confidential and cannot be exhibited, nor their contents disclosed, to third parties except with the consent of the upgiver. Even a diligence may not be enforced if

<sup>1</sup> Death Duties (Killed in War) Act, 1914 (4 & 5 Geo. V. c. 76), s. 1 (3).

<sup>2</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8 (11); and Finance Act, 1907 (7 Edw. VII. c. 13), s. 13.

<sup>3</sup> 57 & 58 Vict. c. 30.

<sup>4</sup> 36 Geo. III. c. 52.

<sup>5</sup> 16 & 17 Vict. c. 51.

<sup>6</sup> 58 & 59 Vict. c. 19.

<sup>7</sup> As to the extent of the claims requiring to be satisfied, see *Ewing's Trs. v. Mathieson* (O.H.), 1906, 44 S.L.R. 12; 14 S.L.T. 135; and as to the practice of the English Courts as to a contingent future claim, see *Taylor v. Poncia*, [1901] W.N. 87.

<sup>8</sup> In making application for a certificate in this connection, a print or copy of the Record (with any Condescendence and Claims) and a copy of the Interlocutors should be submitted.

such enforcement would be prejudicial to the public interest,<sup>1</sup> but the Court has a discretion to order production.<sup>2</sup>

#### SECTION 11.—RECOVERY OF DUTY AND PENALTIES.

**639.** Proceedings for recovery of duties and penalties in Scotland are brought in the Court of Session as Court of Exchequer in Scotland, which has exclusive jurisdiction in such matters—ss. 1 and 2 of the Exchequer Court (Scotland) Act, 1856.<sup>3</sup> Unless where expressly allowed by the Act, all Exchequer Causes must be brought in the first instance before the Lord Ordinary in Exchequer Causes (s. 2), and proceedings connected with the revenue raised against the Crown in any other Court than the Court of Exchequer may be interdicted (s. 14). The Crown may sue for duty and penalties either by way of subpœna and information (ss. 5, 6, and 7) or by way of summons as in ordinary Court of Session cases (s. 10), but where in any cause commenced by subpœna the parties are agreed upon the facts it is competent for them to lodge a special case (s. 8). The procedure by way of subpœna and information is prescribed by the Act. In so far as not prescribed the Lord Ordinary may regulate the procedure, and in so far as not regulated it follows the ordinary procedure before the Court of Session (s. 9). This procedure being of a quasi-criminal nature, it is necessary for the defender to plead to the truth or otherwise of the information (s. 6).<sup>4</sup> In the case cited below,<sup>4</sup> the point arose<sup>5</sup> whether in Exchequer prosecutions disputed questions of fact should be referred to a jury, but this has never been done, and the practice has been to ascertain the facts by proof before the Lord Ordinary.<sup>6</sup> Exchequer Causes have precedence in both the Inner and Outer House (s. 25), and the Crown has the privilege of being heard last (s. 23). There is a right of appeal to the Inner House and to the House of Lords. The Crown and the subject are entitled to move for and recover expenses of process in the same manner as in proceedings between subject and subject (s. 24).

**640.** Provision for the recovery of money received for duty is made by s. 2 of the Stamp Duties Management Act, 1891;<sup>7</sup> and the recovery of penalties is further provided for by the Inland Revenue Regulation Act, 1890, ss. 21 *et seq.*<sup>8</sup>

<sup>1</sup> *Brown's Trs. v. Inland Revenue Commrs.* (O.H.), 1897, 35 S.L.R. 340; 5 S.L.T. 166; see also *Admiralty v. Aberdeen Steam Trawling and Fishing Co., Ltd.*, 1909 S.C. 335; and *Forrest v. Macgregor*, 1913 (O.H.), 1 S.L.T. 372.

<sup>2</sup> *Henderson v. M'Gown*, 1916 S.C. 821.

<sup>3</sup> 19 & 20 Vict. c. 56; see also the Crown Suits (Scotland) Act, 1857 (20 & 21 Vict. c. 44).

<sup>4</sup> *Lord Advocate v. Thomson*, 1897, 24 R. 543.

<sup>5</sup> See *Lord M'Laren* at 24 R. 548.

<sup>6</sup> See *Lord Advocate v. Sawers* (O.H.), 1898, 35 S.L.R. 482.

<sup>7</sup> 54 & 55 Vict. c. 38.

<sup>8</sup> 53 & 54 Vict. c. 21.



## SECTION 12.—PROCEEDINGS AGAINST THE CROWN.

**641.** If the Commissioners decline to make any allowance or repayment of death duties in circumstances in which an appeal under s. 10 of the Finance Act, 1894,<sup>1</sup> is not appropriate, the proper course in England is for the subject to proceed by way of petition of right<sup>2</sup> under the provisions of the Petitions of Right Act, 1860.<sup>3, 4</sup> In Scotland, however, the subject proceeds by way of direct action against the Lord Advocate as representing the Commissioners of Inland Revenue,<sup>5</sup> such action being brought before the Lord Ordinary in Exchequer Causes,<sup>6</sup> and if brought before any other judge, the Crown has right to have the proceedings interdicted<sup>7</sup> or the process removed to the Lord Ordinary in Exchequer Causes. A recent example of proceedings by a subject will be found in the undernoted case.<sup>8</sup>

PART II.—ESTATE DUTY.<sup>9</sup>

## SECTION 1.—THE PROPERTY LIABLE.

SUBSECTION (1).—*Property passing and deemed to Pass.*

**642.** The British Estate Duty, as already shortly explained,<sup>10</sup> is in the nature of a transfer or mutation duty in respect of property passing on death. It is the creation of Part I. of the Finance Act, 1894,<sup>11</sup> which though amended by numerous subsequent Acts still remains “the principal Act.” Where, therefore, in what follows in Part II. hereof any section is referred to without further specification, it is to a section of the “principal Act,” *i.e.* the Finance Act, 1894,<sup>11</sup> that reference is made.

**643.** The levy of the duty is contained in s. 1, which provides that in the case of every person dying after the 1st August 1894,<sup>12</sup> there shall, apart from express exemptions, be levied and paid on the principal value of all property, whether settled or not, which passes on the death of such a person, a duty called “Estate Duty.” As regards property

<sup>1</sup> 57 & 58 Vict. c. 30 ; and see para. 749, *infra*.

<sup>2</sup> *The Queen v. Inland Revenue Commrs.* (*Nathan's case*), 1884, 12 Q.B.D. 461.

<sup>3</sup> 23 & 24 Vict. c. 34.

<sup>4</sup> An example of procedure under the statute in a revenue case will be found in *Perciva v. The Queen*, 1864, 3 H. & C. 217—a claim for return of Probate Duty.

<sup>5</sup> Exchequer Court (Scotland) Act, 1856 (19 & 20 Vict. c. 56), s. 22 ; see also the Crown Suits (Scotland) Act, 1857 (20 & 21 Vict. c. 44).

<sup>6</sup> *Ibid.*, s. 2.

<sup>7</sup> *Ibid.*, s. 14.

<sup>8</sup> *Mackinnon's Trs. v. Lord Advocate*, 1919 S.C. 684 ; 1920 S.C. (H.L.) 171 ; and [1921] A.C. 146 under title *Lord Advocate v. Jaffrey*.

<sup>9</sup> The expression “Estate Duty” means Estate Duty under the Finance Act, 1894 (57 & 58 Vict. c. 30) ; see s. 22 (1) (*e*) of that Act.

<sup>10</sup> See *ante*, paras. 612 and 618.

<sup>11</sup> 57 & 58 Vict. c. 30.

<sup>12</sup> As the Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. c. 29), permits the Scottish Courts to find that a person died on a particular date, such a finding will determine the date of death for the purpose of Estate Duty.

situate outside Great Britain, however, s. 2 (2) <sup>1</sup> provides that such property passing on the death shall be included only if, under the law in force prior to the passing of the Act, Legacy or Succession Duty would have been payable. These provisions have the effect of rendering liable to Estate Duty (1) all property in Great Britain passing on death under any title and irrespective of the domicile of the deceased owner or the forum of the trust; and (2) personal or moveable property outside Great Britain if (a) it forms part of the estate of a deceased person whose domicile was in Great Britain, since Legacy Duty would have been payable, or (b) it is subject at the time of passing to a British trust, as Succession Duty would have been payable.<sup>2</sup> The expression "property passing on the death" is defined by s. 22 (1) (l) to include property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and the expression "on the death" is defined to include "at a period ascertainable only by reference to the death." The area of the charge is increased by s. 2 (1), which provides that property passing is to be deemed to include certain special classes of property, some at least of which are not cases of visible passing in the sense of "changing hands" <sup>3</sup> on death. The inter-relation of ss. 1 and 2 (1) of the Act has given rise to somewhat conflicting judicial dicta,<sup>4</sup> but a reasonable and convincing explanation of their relation, as given by Lord Haldane L.C. in a recent case,<sup>5</sup> is that s. 2 (1) extends the application of s. 1 "to certain cases which are not in reality cases of changing hands on death at all, but are to such an extent in an analogous position that it has been deemed proper in these instances to impose a similar tax." As regards Scotland, there is a special provision in s. 23 (12) that the property comprised in any special assignation or disposition taking effect on death shall be deemed to pass within the meaning of the Act. This will cover the "special assignations and dispositions" referred to in the Scots Act of 1690 anent confirmations, the effect of which was specially preserved by 4 Geo. IV. c. 98, s. 4.

The property liable, therefore, includes that specified in the following paragraphs.

#### SUBSECTION (2).—*The Deceased's own Estate.*

**644.** This covers the whole personal or moveable and real or heritable estate in England and Scotland, passing under his testamentary writings or under intestacy (ss. 1, 2 (1) (a), and 23 (8) and

<sup>1</sup> As now adapted by the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80); the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (S.R. & O., 1923, No. 405); and extended by the Finance Act, 1923 (13 & 14 Geo. V. c. 14), s. 37.

<sup>2</sup> See further hereon, under "Foreign Property" at paras. 654-657, *infra*.

<sup>3</sup> Per Lord Haldane in *Nevill*, *infra*.

<sup>4</sup> See, for example, Lord Macnaghten in *Earl Cowley v. Inland Revenue Commrs.*, [1899] A.C. at p. 212; and Lord Haldane in *Attorney-General v. Milne*, [1914] A.C. at p. 769.

<sup>5</sup> *Nevill v. Inland Revenue Commrs.*, [1924] A.C. at p. 389.

(9) of the principal Act), regardless of the domicile of the deceased, and also the moveable estate outside Great Britain, if the deceased died domiciled in some part of Great Britain (s. 2 (2)). Immoveable estate, as such, outside Great Britain is not liable to duty, whatever the domicile of the deceased (s. 2 (2)). Interests in expectancy and all other future interests, whether vested or contingent, are included (s. 22 (1) (j)),<sup>1</sup> and reversionary interests in property which the deceased himself liferents, subject to the provisions of s. 7 (10). Policies of assurance vested in the deceased, whether on his own life or the life of another, fall under this head, and the latter do not fall under the definition of interests in expectancy in s. 22 (1) (j). Ann is not *in bonis* of a deceased incumbent,<sup>2</sup> and is not considered to be liable to Estate Duty. The charge of duty under this head covers, *inter alia*, the area of the former Inventory Duty,<sup>3</sup> which accordingly ceases to be payable (s. 1 and First Schedule to the principal Act).

#### SUBSECTION (3).—*Competency to Dispose.*

**645.** Property of which the deceased was at the time of his death competent to dispose is liable to duty under ss. 1 and 2 (1) (a). A person is by s. 22 (2) (a) deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property, and it follows that a deceased person may be competent to dispose although by personal disability he was not legally capable of disposing. Under this head is included property in regard to which the deceased had a general power of appointment (s. 22 (2) (a)), whether exercised or not,<sup>4</sup> and whether it was exercisable by instrument *inter vivos* or by will, or both (s. 22 (2) (a)); money which the deceased had a general power to charge on property<sup>5</sup> (s. 22 (2) (c)); entailed estate in the possession of an institute or heir of entail (s. 23 (15)); property standing in joint names on a destination which, though subject to revocation at the deceased's instance, takes effect if not revoked; and property settled by the deceased *inter vivos* with a reserved power of revocation, or as to which revocation is competent by law.<sup>6</sup> A mere power to trench on capital for necessary purposes is not considered to involve a competency to dispose of the part of the capital not required, but a right to claim legitim or *jus relictæ* or to collate, if subsisting undischarged at the death,

<sup>1</sup> Per Lord Macnaghten in *Inland Revenue Commrs. v. Priestley*, [1901] A.C. at p. 213, an expectant interest is dutiable not under s. 1 but under s. 2 (1) (a).

<sup>2</sup> *Latta v. Edinburgh Ecclesiastical Commrs.*, 1877, 5 R. 266.

<sup>3</sup> See para. 614, *supra*.

<sup>4</sup> A power of appointment may be general although certain persons named or indicated are excluded from benefiting under it (*Drake v. Attorney-General*, 1843, 10 Cl. & F. 257).

<sup>5</sup> In *Lord Advocate v. Earl of Moray's Trs.*, 1904, 6 F. 347, the Lord Ordinary (Stormonth-Darling) expressed the view that the property referred to in s. 22 (2) (c) was the "property of somebody else."

<sup>6</sup> *Lord Advocate v. Gunning's Trs.*, 1907 S.C. 800; but see Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. V. c. 64), s. 5.



seems to fall within the category of property of which the deceased was competent to dispose, as also does the right to charge on an entailed estate duties or improvement expenditure<sup>1</sup> met by the deceased out of his own pocket. Property under this head may "pass" within the meaning of s. 1, in the sense of changing possession on death, or liability to duty may arise under s. 2 (1) (a) in respect merely of the "competency to dispose."

SUBSECTION (4).—*Settled Property and Interests Ceasing.*

**646.** Settled property passing on death, including property in which the deceased or some other person had an interest ceasing on the death of the deceased, is liable to duty under ss. 1 and 2 (1) (b). Under this head are included all passings of settled property,<sup>2</sup> the possession of which changes on death, and also all cessers of interest by death, although possession of the property does not change, *e.g.* the termination by death of annuity or other limited interests in property. It is necessary, however, where the property does not actually pass, that the interest ceasing should be an interest in property;<sup>3</sup> that the extent of the interest ceasing should be capable of being defined or ascertained;<sup>4</sup> and that there should be a benefit accruing or arising by the cesser<sup>5</sup> (s. 2 (1) (b)), though the benefit may be to the property or the estate and not to a person.<sup>6</sup> It is not material that the interest was not to be enjoyed during the whole life of the deceased, *e.g.* was to terminate in any event on his attaining majority;<sup>4</sup> but there is express exclusion from the charge of duty where the interest was enjoyed simply *ex officio*, *e.g.* by a trustee,<sup>7</sup> or by the recipient of the benefits of a charity. It will be observed that the interest which ceased on the death of the deceased may have been that of some person other than the deceased. Where, however, under the terms of a settlement, X., who had a vested interest in fee, was entitled only to the income of the settled property during the lifetime of Y., the cesser of X.'s interest in the income on Y.'s death does not give rise to a claim for duty on that death.<sup>8</sup> In the case of a continuing annuity, so expressed as to be in reality an annuity to endure for a period covering more than one life, there may be a passing under s. 1 on the first death of the benefit then accruing to others for the

<sup>1</sup> See remarks of Lord Pres. Inglis in *Earl of Kintore v. Countess of Kintore*, 1885, 12 R. at p. 1217.

<sup>2</sup> As to what the expression "settled property" includes, see *Lord Advocate v. Stewart's Trs.*, 1899, 1 F. 416, and particularly the opinion of Lord M'Laren at p. 422, that it, as construed by s. 22 (1) (h) and (i), includes "every device known to conveyancers by which the enjoyment of estate under the same deed or will may be had by different persons succeeding to the estate in their order."

<sup>3</sup> *Attorney-General v. Watson*, [1917] 2 K.B. 427.

<sup>4</sup> *Attorney-General v. Coole*, [1921] 3 K.B. 607.

<sup>5</sup> As to the *quantum* of the property deemed to pass in these circumstances, see s. 7 (7) and para. 699, *infra*.

<sup>6</sup> *Lord Advocate v. MacLachlan*, 1899, 1 F. 917.

<sup>7</sup> *Attorney-General v. Eyres*, [1909] 1 K.B. 723.

<sup>8</sup> *In re Townsend*, [1901] 2 K.B. 331.

term of the annuity. This appears to have been the line followed in the undernoted case.<sup>1</sup>

**647.** An example of property falling into this category would appear to be found in the operation of "shifting clauses" in entails. If property X. is possessed by A. with a clause of devolution in favour of B. on A. succeeding to the estate of Y., and on C.'s death A. does in fact succeed to Y., Estate Duty is considered to be payable on C.'s death in respect of both X. and Y.

**648.** Where a tenant for life and the remainderman in tail had conjoined in burdening the property, it was regarded as *pro tanto* taken out of settlement, and only the equity of redemption was held liable to duty on the death of the tenant for life,<sup>2</sup> but where the life-tenant was indemnified from the mortgage and interest thereon, the whole property was held to have passed.<sup>3</sup>

SUBSECTION (5).—*Gifts, Absolute and mortis causa.*

**649.** Absolute *inter vivos* gifts not made three years before the donor's death<sup>4</sup> and donations *mortis causa*<sup>5</sup> are liable to Estate Duty. Sec. 2 (1) (c) operates by way of reference to s. 38 of the Customs and Inland Revenue Act, 1881,<sup>6</sup> as amended by s. 11 of the Customs and Inland Revenue Act, 1889,<sup>7</sup> imposing the superseded Account Duty, and extends their provisions to heritable property. The original period of twelve months was extended by s. 59 (1) of the Finance (1909–10) Act, 1910,<sup>8</sup> to three years, except in the case of gifts for public or charitable purposes. It is immaterial how the gift is effected in point of form, whether by transfer, delivery, declaration of trust or otherwise,<sup>9</sup> and the gift, to escape duty, must be complete outwith the specified period. A transfer for merely nominal consideration is within the levy,<sup>10</sup> and the presence of moral obligation does not confer exemption,<sup>11</sup> nor does the fact that the gift was promised at an earlier date,<sup>12</sup> or that it was effected by way of appointment in exercise of a power to charge,<sup>13</sup> or by way of obligation in a child's marriage contract.<sup>14</sup> In the case of persons dying on or after 30th April 1909, exemption is conferred by s. 59 (2) of the Act of 1910 on *inter vivos* gifts made in consideration of marriage, or shewn

<sup>1</sup> *In re Cassel, Public Trustee v. Mountbatten* (No. 2), 1927, 137 L.T. 785.

<sup>2</sup> *Cowley v. Inland Revenue Commrs.*, [1899] A.C. 198.

<sup>3</sup> *Attorney-General v. Montague*, [1904] A.C. 316.

<sup>4</sup> Sec. 2 (1) (c) of the principal Act; Finance (1909–10) Act, 1910, s. 59 (1).

<sup>5</sup> Sec. 2 (1) (c) of the principal Act. <sup>6</sup> 44 & 45 Vict. c. 12.

<sup>7</sup> 52 & 53 Vict. c. 7.

<sup>8</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>9</sup> Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 38 (2) (a).

<sup>10</sup> *Attorney-General v. Wack*, 1899, Times, 14th June; and see Phillimore J. in *Attorney-General v. Johnson*, [1902] 1 K.B. at p. 425.

<sup>11</sup> *Attorney-General v. Chamberlain*, 1904, 90 L.T. 581.

<sup>12</sup> *Attorney-General v. Cobham*, 1904, 90 L.T. 816; but cf. *Matheson v. Inland Revenue Commrs.*, 1898, 14 Sher. Ct. Rep. 156.

<sup>13</sup> *Lord Advocate v. Heywood-Lonsdale's Trs.*, 1906 (O.H.), 43 S.L.R. 589.

<sup>14</sup> *Ibid.*, 1906, 8 F. 724.

to have been part of the deceased's normal expenditure, and to have been reasonable having regard to his income or to the circumstances, or which in the case of any donee do not exceed in the aggregate £100. This exemption has no reference to donations *mortis causa*. It should also be in view that a gift, though completed outwith the three years, does not escape duty if effected merely by the granting of an obligation, whether secured or not, as in such a case deduction of the amount of the obligation is prohibited in a question of Estate Duty as not being a debt incurred for full consideration in money or money's worth (s. 7 (1)).<sup>1</sup>

#### SUBSECTION (6).—*Gifts under Reservation.*

**650.** Estate Duty is payable upon gifts made at any time, *bona fide* possession and enjoyment of which were not assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise, including a right of revocation.<sup>2</sup> It is immaterial how long prior to the death the gift was made, provided the donor was not immediately and wholly excluded from benefit. The benefit reserved in making the gift need not be secured thereon,<sup>3</sup> and while it must be constituted by way of contract, or other arrangement *ejusdem generis*,<sup>4</sup> it is immaterial that it is defeasible in the discretion of trustees.<sup>5</sup> The statute makes no reference to the *quantum* of the benefit reserved or stipulated for, and it has been judicially observed that "any interest, however small, will do,"<sup>6</sup> and that "greater or less degree (of non-exclusion) is not to make a difference";<sup>7</sup> and an obligation to pay the donor's debts "negatives the exclusion of the donor from any benefit in the property the subject of the gift."<sup>8</sup> Where, however, a reserved income is not a charge upon the whole property gifted, and the latter can be severed into two parts, in only one of which was there a reservation, the other part may escape duty;<sup>9</sup> and if, by surrender of the benefit reserved, or otherwise, the property gifted subject to a reservation is in fact enjoyed to the entire exclusion of the donor for three years preceding his death, the duty does not attach.<sup>10</sup>

<sup>1</sup> See para. 702, *infra*. As to gifts in reduction of the National Debt, see para. 671, *infra*.

<sup>2</sup> Sec. 2 (1) (c) of the principal Act.

<sup>3</sup> *Attorney-General v. Worrall*, [1895] 1 Q.B. 99, a case on Account Duty.

<sup>4</sup> *Attorney-General v. Secombe*, [1911] 2 K.B. 688; and see *Lord Advocate v. M'Taggart Stewart*, 1906, 8 F. 579.

<sup>5</sup> *Attorney-General v. Heywood*, 1887, 19 Q.B.D. 326, a case on Account Duty.

<sup>6</sup> Per Channel J. in *Attorney-General v. Earl Grey*, [1898] 1 Q.B. at p. 325.

<sup>7</sup> Per Lord President Dunedin, in *Lord Advocate v. M'Taggart Stewart*, *supra*, at p. 595.

<sup>8</sup> Per Vaughan Williams L.J. in *Attorney-General v. Earl Grey*, [1898] 2 Q.B. at p. 546.

<sup>9</sup> This follows the line taken by the Irish case of *In re Cochrane*, [1906] 2 I.R. 200; but see Lord Pearson (Ordinary) in *Lord Advocate v. M'Taggart Stewart*, *supra*, at p. 592, on the question of indivisibility.

<sup>10</sup> Finance (1909-10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 59 (3). It will be observed that this provision does not in terms apply to the surrender of a reserved right of revocation.



SUBSECTION (7).—*Annuities or Other Interests Provided.*

**651.** Estate Duty is payable upon annuities or other interests purchased or provided by the deceased, either alone, or in concert or by arrangement with some other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased;<sup>1</sup> and upon moneys payable under policies of assurance effected by the deceased on his own life and kept up by him wholly or partially for the benefit of a donee.<sup>2</sup> As it has been held<sup>3</sup> that moneys payable under a life assurance policy are an "interest" within the meaning of s. 2 (1) (d), that section and s. 2 (1) (c) (which embodies s. 38 of the Customs and Inland Revenue Act, 1881,<sup>4</sup> as amended by s. 11 of the Customs and Inland Revenue Act, 1889<sup>5</sup>) overlap to some extent as regards policy moneys. A gratuitous assignation of a policy more than three years before death,<sup>6</sup> where the subsequent premiums are wholly paid by the donee, escapes liability,<sup>7</sup> but not so an assignation in trust where the premiums are to be paid out of funds similarly assigned by the deceased<sup>8</sup> or under arrangements made by him.<sup>9</sup> The provision must be by the deceased "in concert or by arrangement" with another person, not by some other person in concert with the deceased,<sup>10</sup> and must be provided by him in a real sense,<sup>11</sup> though an obligation to pay premiums is not necessary if he in fact paid them. As regards the application of the expressions "wholly" or "partially kept up," it would seem that these relate solely to the time subsequent to the gift when first a donee was designated.<sup>12</sup> The claim for Estate Duty extends to policies effected by the deceased in survivorship or nomination terms, or under the Married Women's Policies of Assurance (Scotland) Act, 1880,<sup>13</sup> or the Married Women's Property Act, 1882.<sup>14</sup>

**652.** The liability to duty of interests purchased or provided by the deceased includes survivorship annuities where a benefit accrues to the survivor, and similarly under the terms of any joint purchase,<sup>15</sup> and also annuities and sums for payment of which the deceased has stipulated in arrangements made with third parties, *e.g.* an annuity<sup>16</sup> stipulated to be paid to a deceased partner's widow by his surviving partners; and it also includes annuities, etc. secured by the deceased's membership of societies or by his service with firms or bodies having provident schemes. Exemption arises, however, in respect of a single

<sup>1</sup> Sec. 2 (1) (d) of the principal Act.

<sup>3</sup> *Attorney-General v. Dobree*, [1900] 1 Q.B. 442.

<sup>5</sup> 52 & 53 Vict. c. 7.

<sup>7</sup> *Lord Advocate v. Fleming or Robertson*, [1897] A.C. 145, a case on Account Duty.

<sup>8</sup> *Inland Revenue v. Scott's Trs.*, 1918 S.C. 720.

<sup>9</sup> *Attorney-General v. Hawkins*, [1901] 1 K.B. 285.

<sup>10</sup> *Attorney-General v. Murray*, [1904] 1 K.B. 165 (C.A.).

<sup>11</sup> *Richardson v. Inland Revenue Commrs.*, [1909] 2 I.R. 597.

<sup>12</sup> *Lord Advocate v. Fleming or Robertson*, *supra*.

<sup>13</sup> 43 & 44 Vict. c. 26.

<sup>2</sup> Sec. 2 (1) (c) of the principal Act.

<sup>4</sup> 44 & 45 Vict. c. 12.

<sup>6</sup> See para. 649, *supra*.

<sup>14</sup> 45 & 46 Vict. c. 75.

<sup>15</sup> See *Attorney-General v. Ellis*, [1895] 2 Q.B. 466, a case on Account Duty.

<sup>16</sup> *Attorney-General v. Wendt*, 1895, 65 L.J. Q.B. 54, a case on Account Duty.

annuity not exceeding £25 to any person, or the annuity first granted if more than one (s. 15 (1)), and in respect of pensions and annuities payable by the Government of British India to the widows and children of officers of the Government (s. 15 (3)), and duty is not in practice charged on sums payable by reason of death under the Employers Liability Act, the Workmen's Compensation Acts, or the recent Contributory Pensions Act.

#### SUBSECTION (8).—*Surrenders of Life Interests.*

**653.** Duty is payable upon all property in which an interest limited to cease on death has been surrendered to or for the benefit of the reversioner, unless such surrender was made three years before the death and *bona fide* possession and enjoyment of the property was immediately assumed and retained to the entire exclusion of the surrenderor and of any benefit to him by contract or otherwise.<sup>1</sup> It may be noted that the Courts held <sup>2</sup> that property, the life interest in which was surrendered by the life-tenant to the remainderman, did not pass within the meaning of the principal Act, and the provision of s. 11 (1) of the Finance Act, 1900,<sup>3</sup> was required to render such a case liable to duty. Under it, liability emerges whether the surrender was for value or not, and the provision expressly covers (s. 11 (2)) in Scotland the conveyance or discharge of any liferent in favour of the fiar, and the propulsiion of the fee under any simple or tailzied destination. Exemption arises, however, if a reservation made at the time of the surrender is discharged three years before death.<sup>4</sup> The surrender must be in favour of a person "entitled to an estate or interest in remainder or reversion," which has been held <sup>5</sup> not to include the fee-simple owner of real estate subject to an annuity. If the surrender was for public or charitable purposes, the period is twelve months, not three years.<sup>6</sup>

#### SECTION 2.—FOREIGN PROPERTY.

##### SUBSECTION (1).—*Property devolving directly under Will or Intestacy.*

**654.** As already mentioned, property situated out of Great Britain is liable to Estate Duty only if it would have been liable to Legacy or Succession Duty under the law in force prior to 1894. As regards foreign moveable estate devolving directly under a will or intestacy, neither Legacy Duty <sup>7</sup> nor Succession Duty <sup>8</sup> was so payable in the

<sup>1</sup> Finance Act, 1900 (63 & 64 Vict. c. 7), s. 11 (1); and Finance (1909-10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 59 (1). As to reservation of benefit, see para. 650, *supra*.

<sup>2</sup> In *Attorney-General v. Beech*, [1899] A.C. 53; and *Attorney-General v. De Preville*, [1900] 1 Q.B. 223 (C.A.).

<sup>3</sup> 63 & 64 Vict. c. 7.

<sup>4</sup> Finance (1909-10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 59 (3).

<sup>5</sup> *Attorney-General v. Lane Fox*, [1924] 2 K.B. 498.

<sup>6</sup> Finance (1909-10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 59 (1) proviso.

<sup>7</sup> *Thomson v. Advocate-General*, 1845 (H.L.), 12 Cl. & F. 1.

<sup>8</sup> *Wallace v. Attorney-General*, 1865, L.R. 1 Ch. 1.

case of a person who died domiciled abroad, and Estate Duty is accordingly payable in such a case only if the deceased died domiciled in some part of Great Britain. Immoveable property abroad, devolving as above, was not liable to Succession Duty whatever the domicile, and this holds as regards Estate Duty. The precise quality of the deceased's right requires, however, to be regarded, and Estate Duty is payable in the case of a person dying domiciled in some part of Great Britain in respect of his interest in foreign immoveable property which forms partnership property,<sup>1</sup> or is subject to a trust for sale.<sup>2</sup> Similarly assets which were not liable to duty on the death of a testator are liable on the death of a beneficiary whose right is simply a claim to a share of a residue in the hands of British executors,<sup>3</sup> and money secured by mortgage on foreign immoveable property is, in general, also liable, as being in character a debt with an accessory right to resort to the land for payment.<sup>4</sup> On the question of domicile, which is the test of liability in this connection, it need only here be noted that where a domicile of origin is proved or admitted, it lies upon the person who asserts a change of domicile to establish the change, and to prove that the deceased "had a fixed and determined purpose to make the place of his new domicile his permanent home."<sup>5</sup> Reference may, however, be made to the undernoted Scottish cases,<sup>6</sup> in which the question of domicile was raised by the Revenue in connection with liability to death duties.

#### SUBSECTION (2).—*Settled Property and Gifts.*

**655.** The liability to Succession Duty of property situate abroad and passing under settlement has been the subject of a series of decisions<sup>7</sup> from which has emerged the rule that such liability to Succession Duty (and so to Estate Duty) depends on whether or not the property in question forms, at the time of the death in question, the subject of a British trust, *i.e.* whether or not the British Courts are the appropriate forum of administration.<sup>8</sup> A claim, therefore, attaches "where property is found to be legally vested in a person subject to the jurisdiction of [British] Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of [Great Britain], even although the operation of the instrument creating that title may

<sup>1</sup> *Forbes v. Steven*; *Mackenzie v. Forbes*, 1870, L.R. 10 Eq. 178; *In re Stokes, Stokes v. Ducroz*, 1890, 62 L.T. 176, cases on Legacy Duty; see also *Lord Advocate v. Macfarlane's Trs.*, 1893 (O.H.), 31 S.L.R. 357, as to a share of heritage forming the subject of a joint adventure.

<sup>2</sup> *In re Smyth, Leach v. Leach*, [1898] 1 Ch. 89, a case on Probate Duty.

<sup>3</sup> *Sudeley v. Attorney-General*, [1897] A.C. 11, a case on Probate Duty.

<sup>4</sup> This follows the Irish case of *Lawson v. Inland Revenue Commrs.*, [1896] 2 I.R. 418.

<sup>5</sup> Per Lord Halsbury L.C. in *Winans v. Attorney-General*, [1904] A.C. at p. 288.

<sup>6</sup> *Inland Revenue Commrs. v. Gordon's Exrs.*, 1850, 12 D. 657; *Lord Advocate v. Brown's Trs.*, 1907 S.C. 333; *Mackinnon's Trs. v. Inland Revenue Commrs.*, 1920 S.C. (H.L.) 171.

<sup>7</sup> See para. 796, *infra*.

<sup>8</sup> The liability of property locally situate in Great Britain is not, of course, in question. Such property is liable independently of the forum.



to some extent be governed by foreign law.”<sup>1</sup> If this condition be fulfilled, neither the domicile of the settlor nor the situation of the property<sup>2</sup> is material, but if the property consist of immoveable estate abroad, duty is payable only if the property is subject to a trust for sale.<sup>3</sup> Portions of an American trust fund directed by an English testator to be used in payment of British Death Duties were held not themselves to be liable to British Death Duties,<sup>4</sup> but the decision<sup>5</sup> that prepayment of Legacy Duty under s. 12 of the Legacy Duty Act, 1796,<sup>6</sup> prevented its being regarded as due on the death of a liferenter, and so negatived a claim for Estate Duty on that death, is overruled in the case of deaths on or after 16th April 1923 by the provisions of s. 37 of the Finance Act, 1923.<sup>7</sup>

**656.** Foreign property forming the subject of an out-and-out *inter vivos* gift is not liable to Estate Duty, as it did not incur liability to Legacy or Succession Duty, but a reservation to the donor which inferred a benefit to the donee on his (the donor's) death would presumably involve such liability, and a donation *mortis causa* of foreign moveables is liable to Estate Duty, as being liable to Legacy Duty.<sup>8</sup>

#### SUBSECTION (3).—*Locality of Assets.*

**657.** The restricted liability to duty of property situated abroad makes important the question of the local situation of property, and difficulties have arisen where this is not self-evident, as in the case of certain incorporeal moveable rights. Subject to the provisions of the Revenue Act, 1862,<sup>9</sup> a “specialty debt” is apparently by English law regarded as situate where the sealed document evidencing it is physically located at the time of the creditor's death,<sup>10</sup> but this doctrine has no place in Scots law under which the rule (operating also in England as to simple contract debts) is that an obligation is situated in the country where the debtor resides or in which payment is stipulated for and can be enforced. A local situation may, however, be found at a branch residence of a debtor if the terms of the contract in fact localise the debt there.<sup>11</sup> Foreign<sup>12</sup> and colonial<sup>13</sup> bearer securities, and certificates endorsed in blank,<sup>14</sup> if physically located in Great Britain

<sup>1</sup> Per Stirling L.J. in *Attorney-General v. Jewish Colonisation Assn.*, [1901] 1 K.B. at p. 142.

<sup>2</sup> As in above case; but cf. *Attorney-General v. Belilios*, 1927, 138 L.T.R. 294.

<sup>3</sup> *Attorney-General v. Johnson*, [1907] 2 K.B. 885.

<sup>4</sup> *Attorney-General v. Astor*, [1923] 2 K.B. 157.

<sup>5</sup> *Attorney-General v. Burns*, [1923] 2 K.B. 77.

<sup>6</sup> 36 Geo. III. c. 52.

<sup>7</sup> 13 & 14 Geo. V. c. 14.

<sup>8</sup> Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4.

<sup>9</sup> 25 & 26 Vict. c. 22.

<sup>10</sup> *Commr. of Stamps v. Hope*, [1891] A.C. 476.

<sup>11</sup> *New York Life Insurance Co. v. Public Tr.*, [1924] 2 Ch. 101 (C.A.); cf. also *Rex v. Lovitt*, [1912] A.C. 212, P.C.

<sup>12</sup> *Attorney-General v. Bouwens*, 1838, 4 M. & W. 171; *Winans v. Attorney-General*, [1910] A.C. 27.

<sup>13</sup> *Attorney-General v. Glendinning*, 1904, 92 L.T. 87.

<sup>14</sup> *Stern v. The Queen*, [1896] 1 Q.B. 211.

and negotiable there, are, however, always liable to Estate Duty as situate in Great Britain, as also are all stocks registered or inscribed and transferable on a register kept in Great Britain.<sup>1</sup> Under the provisions of s. 36 (b) of the Companies (Consolidation) Act, 1908,<sup>2</sup> the shares in British companies of deceased members who die domiciled in some part of Great Britain, though registered in a colonial register, are for fiscal purposes deemed to be situate in Great Britain.

### SECTION 3.—PROPERTY EXEMPTED FROM DUTY.

#### SUBSECTION (1).—*Settled Property which has borne Duty.*

**658.** The principal Act placed certain classes of settled property in a special position by enacting (s. 5 (2)) that if Estate Duty had been paid under a settlement in respect of such property, it should not again be levied until the death of a person who was then or had been previously competent to dispose of it, and who, if on his death subsequent limitations under the settlement took effect, was *sui juris* at his death or had been so while technically "competent to dispose" (s. 13 of the Finance Act, 1898).<sup>3</sup> A similar provision (s. 21 (1)) protected settled property which had borne Inventory Duty, Probate Duty, or Account Duty, and operated although the personal estate which bore duty had been converted into realty under the testator's instructions.<sup>4</sup> It was held that payment of Estate Duty with reference to the death of the owner of a reversionary interest in settled property, whether he was the original settlor<sup>5</sup> or not,<sup>6</sup> fulfilled the conditions of the section, but a payment made under the "settlement" under which the reversioner derived his interest did not frank a passing, under a resettlement by him, of the reversionary interest;<sup>7</sup> nor did a payment on property bequeathed absolutely to a person, but caught by an *acquirenda* clause in that person's marriage contract, frank the passing on the subsequent death of the liferenter under the contract,<sup>8</sup> as such payment had not been made in respect of settled property.

**659.** These exemptions have, however, now been virtually abolished. They were first limited by s. 55 of the Finance (1909–10) Act, 1910,<sup>9</sup> which provided that they should not apply to cases where the payment of duty was with reference to the death of any reversionary owner other than the original settlor; and, subsequently, by s. 14 of the

<sup>1</sup> *Attorney-General v. Higgins*, 1857, 2 H. & N. 339; followed in *Brassard v. Smith*, [1925] A.C. 371 (P.C.); and *Baelz v. Public Tr.*, [1926] 1 Ch. 863.

<sup>2</sup> 8 Edw. VII. c. 69, as adapted by the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80); and the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (S.R. & O., 1923, No. 405).

<sup>3</sup> 61 & 62 Vict. c. 10.

<sup>4</sup> *Attorney-General v. Londesborough*, [1905] 1 K.B. 98.

<sup>5</sup> *Inland Revenue Commrs. v. Priestley*, [1901] A.C. 208; *Attorney-General v. Dodington*, [1897] 2 Q.B. 373.

<sup>6</sup> *Lord Advocate v. Mackenzie's Trs.*, 1905, 12 S.L.T. 758.

<sup>7</sup> *Attorney-General v. Hay*, [1899] 2 Q.B. 245.

<sup>8</sup> *Lord Advocate v. Harvey's Trs.*, 1901, 4 F. 43; *In re Torrington*, [1913] 2 Ch. 623.

<sup>9</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

Finance Act, 1914,<sup>1</sup> they were withdrawn in the case of all deaths after 15th August 1914, except as regards property passing on the death of one of the parties to a marriage, where duty has been paid on the death of the other party to the marriage. From the phrasing of the statute it would appear to be immaterial that the spouses have afterwards been divorced.

SUBSECTION (2).—*Settled Property in which an Interest failed.*

**660.** In terms of s. 5 (3) settled property in which the interest of any person fails or determines by reason of his death before it becomes an interest in possession, and subsequent limitations<sup>2</sup> under the settlement continue to subsist,<sup>3</sup> is not to be deemed to pass on his death, and so escapes Estate Duty. The typical case to which the provision applies would seem to be that of a liferenter, under a subsidiary title, of property which is already liferented under a prior title, and who—by dying before the prior liferent flies off—has been entirely excluded from beneficial enjoyment. It has, however, been applied by the Court in other circumstances, *e.g.* (a) a settlement of property by a wife for payment of income to her during the joint lives of herself and her husband, the capital to go to the survivor in default of issue, where the husband predeceased and the wife became entitled to the capital;<sup>4</sup> (b) the death in minority of a child for whom a share of a trust estate was being held for payment from income of such maintenance as the trustees thought proper and subject thereto to accumulate for him if he attained majority, with a destination-over in default;<sup>5</sup> (c) the death of a person to whom was bequeathed the income of a settled legacy, and who survived the testator but died before (under English rules of administration) he was entitled to receive any income;<sup>6</sup> and it is the present official practice to concede the application of the exemption to cases in which any limited owner (*e.g.* a liferenter) has been excluded from enjoyment of part of his life estate by the existence of a prior annuity. It should be observed, however, that the statute merely says that the property shall not be “deemed” to pass, and the view has been expressed that the provision has no application as regards property which does actually pass.

SUBSECTION (3).—*Scottish Entailed Estate.*

**661.** Property in Scotland held under entail is not “settled property” (s. 23 (14)), but it was specially provided in regard to such property

<sup>1</sup> 4 & 5 Geo. V. c. 10.

<sup>2</sup> That is, “one or more,” per Vaughan Williams J. in *Attorney-General v. Wood*, *infra*.

<sup>3</sup> That is, at “the time of the death of the person whose interest fails,” per Farwell L.J. in *Attorney-General v. Glossop*, *infra*.

<sup>4</sup> *Attorney-General v. Wood*, [1897] 2 Q.B. 102; and see also *Attorney-General v. Glossop*, [1907] 1 K.B. 163.

<sup>5</sup> *Attorney-General (I.) v. Power*, [1906] 2 I.R. 272.

<sup>6</sup> *Re Harrison; Johnstone v. Blackburn and Another*, [1918] 2 Ch. 374; but cf. *Attorney-General v. Watson*, [1917] 2 K.B. 427, where a deceasing annuitant was entitled as from the date of the testator's death.



by s. 23 (16) that, where it had passed on a death to an institute or heir of entail who was not entitled to disentail without consents of subsequent heirs, no second payment of Estate Duty should be demandable until the estate was disentailed or until the death of a subsequent heir of entail entitled to disentail without consents. This position subsisted until the passing of the Finance Act, 1914,<sup>1</sup> when the exemption was abolished (s. 14 of that Act) in the case of deaths after 15th August 1914, except in the case of the death of one of the parties to a marriage, where Estate Duty had been paid on the death of the other party to the marriage. In the only case<sup>2</sup> which has so far come before the Courts in this connection, it was held that in terms of the said sections Estate Duty was payable on the cesser, by a death in 1915, of an annuity secured on entailed estate, notwithstanding a prior payment of Estate Duty on the entailed estate.

#### SUBSECTION (4).—*Transactions of Purchase and Sale.*

**662.** By s. 3 (1) it is provided that duty is not to be payable in respect of property passing on a death by reason only of a *bona fide* purchase from the person under whose disposition the property passes where such purchase was made for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit; and if the consideration was only partial, the value of such consideration is to be allowed as a deduction from the value of the property (s. 3 (2)). The case which this provision would seem to have had in contemplation is that of the purchase of an interest from a vendor on such terms that the purchaser obtains possession only on the vendor's death,<sup>3</sup> and as the exemption is confined to property which passes by reason only of the transaction, it has no bearing on cases of purchased interests in property which is so destined as to pass apart altogether from the terms of the purchase. As to such transactions, the only protection is that conferred by s. 21 (3) and similar provisions in other Finance Acts.<sup>4</sup> The section has, however, been held to cover the case of a share of goodwill which in terms of the partnership deed accrued on the death of a partner to the surviving partners,<sup>5</sup> provided that full consideration was given by such partners;<sup>6</sup> but if the transaction under consideration was not "a matter of pure business, but one of bounty," no exemption arises,<sup>7</sup> and similarly if it was not in reality a sale, but a substitution of security.<sup>8</sup> If money or money's worth is actually paid, it makes no difference "whether this is done under a commercial transaction or a family

<sup>1</sup> 4 & 5 Geo. V. c. 10.

<sup>2</sup> *Lord Advocate v. Earl of Moray* (O.H.), 1917, 1 S.L.T. 168.

<sup>3</sup> See *Darling J. in Attorney-General v. Dobree*, [1900] 1 Q.B. at p. 450.

<sup>4</sup> See para. 687, *infra*.

<sup>5</sup> *Attorney-General v. Boden*, [1912] 1 K.B. 539.

<sup>6</sup> *In re Clark*, 1906, 40 I.L.T. 117.

<sup>7</sup> *Attorney-General v. Johnson*, [1902] 1 K.B. 416; and [1903] 1 K.B. 617.

<sup>8</sup> *Attorney-General v. Smith Marriott*, [1899] 2 Q.B. 595; *Lord Advocate v. Lyell*, 1918 S.C. 125.

arrangement,"<sup>1</sup> but the family arrangement must be "in substance a purchase" and not "a settlement by which a benefit passed,"<sup>2</sup> though the thing granted and the consideration need not "exactly agree" if "what is given is a fair equivalent for what is received."<sup>3</sup>

**663.** The allowance in respect of partial consideration has also come under consideration of the Courts, and the following points emerge. Acceptance by a child from her father of a provision in her marriage contract as in full of legitim and of her share of a provision in her parents' marriage contract did not involve the giving of partial consideration in money or money's worth for the father's own use and benefit;<sup>4</sup> and the stipulation of payment of an annuity by a charity to whom a capital sum was paid over did not prevent the transaction being regarded as wholly a gift.<sup>5</sup> The question of the basis of an allowance for partial consideration was further considered in a recent case<sup>6</sup> in which it was held that where the inadequate price paid represented 80 per cent. of the then value of the interest purchased, the same proportion of the value of the property passing should escape duty.

#### SUBSECTION (5).—*Property Reverting to the Settlor.*

**664.** Under the provisions of s. 15 (1) of the Finance Act, 1896,<sup>7</sup> where by a disposition of property an interest is conferred on any person other than the disponent for the life of such person, or determinable on his death, and such person enters into and retains possession of his interest to the entire exclusion of the disponent or of any benefit to him by contract or otherwise, and the only benefit which the disponent retains is subject to such life interest, and no other interest is created by the disposition, then on the death of such person on or after 1st July 1896, the property is not to be deemed to pass by reason only of the reverter to the disponent in his lifetime. The intention of this provision, as has been pointed out,<sup>8</sup> is simply to prevent a person who has provided a life interest to another having to pay duty on his own property reverting to him, and to restrict it to this type of case conditions are imposed: (a) the life interest granted must be enjoyed without the reservation of any benefit, such as an annuity,<sup>9</sup> to the grantor; (b) no other interest must be created, even the interest of possible children;<sup>10</sup> (c) reverter

<sup>1</sup> Per Sheriff-Substitute Strachan in *Watson v. Inland Revenue Commrs.*, 1900, 16 Sh. Ct. Rep. 235; and see also Lord Loreburn in *Lethbridge v. Attorney-General*, [1907] A.C. 19 at p. 24.

<sup>2</sup> Per Kennedy J. in *Attorney-General v. Hawkins*, [1901] 1 K.B. at p. 293, with which compare *Lethbridge v. Attorney-General*, *supra*.

<sup>3</sup> Per Lord Sterndale M.R. in *Attorney-General v. Sandwich (Earl)*, [1922] 2 K.B. 500 (C.A.) at p. 517.

<sup>4</sup> *Lord Advocate v. Heywood-Lonsdale's Trs.*, 1906, 8 F. 724.

<sup>5</sup> *Attorney-General v. Johnson*, [1902] 1 K.B. 416; and [1903] 1 K.B. 617.

<sup>6</sup> *In re Bateman; Attorney-General v. Wreford Brown*, [1925] 2 K.B. 429.

<sup>7</sup> 59 & 60 Vict. c. 28.

<sup>8</sup> By Grattan J. in *Attorney-General v. Penrhyn*, 1900, 83 L.T. 103.

<sup>9</sup> *Attorney-General v. Glossop*, per Farwell J., [1907] 1 K.B. at p. 178.

<sup>10</sup> *Ibid.*; and see also *Attorney-General v. Penrhyn*, *supra*.

must be to the disponent in his lifetime; and (d) the person taking the life interest must not at any time prior to the disposition have been competent to dispose of the property.<sup>1</sup> The contention that this provision operated where by the divorce of a husband the income of property fell to the wife for life and on her death reverted to him—the argument being that the forfeiture was a “disposition” by the husband—was rejected by the Court,<sup>2</sup> as was also the contention that it applied where a residuary legatee arranged with trustees for the transfer of an annuity to other subjects than those out of which it was payable under the testator’s will.<sup>3</sup>

**665.** By s. 15 (2) of the same Act of 1896 the provision is made applicable where the life interest is conferred on more than one person, either jointly or severally or in succession, and there is a Sheriff Court decision<sup>4</sup> to the effect that exemption is thereby conferred on the death of the first of two persons liferenting in succession. This decision is not, however, treated as governing the official practice, which is to postpone allowance of the benefit of the statute until the death of the second liferenter, until when it cannot be seen whether the property will revert to the settlor in his lifetime.

**666.** By s. 14 of the same Act of 1896, where property is settled by a person on himself for life and after his death on other persons, with an ultimate reversion to the settlor, the property is not to be deemed to pass on the death on or after the 1st July 1896 of any such other person by reason only that the settlor, being then in possession of the property as tenant for life, becomes absolutely entitled in consequence of such death. This is simply a case of enlargement of the interest of the settlor, and the same conclusion was arrived at by the Courts,<sup>5</sup> in a case where the death was before 1896, on the construction of s. 5 (3) of the principal Act.

**667.** By s. 15 (4) of the same Act of 1896, where the deceased person was entitled by law to the rents and profits of real property belonging to his wife, and dies during her lifetime, the property is not to be deemed to pass on his death by reason of her then becoming entitled to the property in virtue of her former interest; and by s. 21 (5) of the principal Act where a husband or wife is entitled, either solely or jointly with the other, to the income of property settled by the other under a disposition which took effect before 2nd August 1894, and on his or her death the survivor becomes entitled to the income of the property settled by such survivor, duty is not to be payable till the death of the survivor. The latter provision was construed by the English Courts<sup>6</sup> as inapplicable where a wife became entitled on her husband’s death

<sup>1</sup> Finance Act, 1896 (59 & 60 Vict. c. 28), s. 15 (3).

<sup>2</sup> *Lord Advocate v. Montgomery's Trs.*, 1914 S.C. 414.

<sup>3</sup> *Lord Advocate v. Lyell*, 1918 S.C. 125.

<sup>4</sup> *Watson v. Inland Revenue Commrs.*, 1900, 16 Sh. Ct. Rep. 235.

<sup>5</sup> *Attorney-General v. Wood*, [1897] 2 Q.B. 102.

<sup>6</sup> *Attorney-General v. Strange*, [1898] 2 Q.B. 39 (C.A.).



to the *corpus* of property settled by her, as the section referred only to income, but there would seem to be ground for holding that a different result would be reached in Scotland where the wife would retain throughout a radical right in the *corpus*.

#### SUBSECTION (6).—*Trust Property.*

**668.** Under s. 2 (3) property passing on the death of the deceased is not to be deemed to include property held by him as trustee for another person (a) under a disposition not made by him, or (b) under a disposition made by him more than twelve months (now three years) prior to death, where possession and enjoyment was *bona fide* assumed by the beneficiary immediately on creation of the trust and retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise, or where any reserved interest was surrendered three years before the death. These conditions have already been referred to.<sup>1</sup> It may be added that where a donor effects a gift by granting bonds which are unpaid at his death he cannot be regarded as holding them in trust for the grantees.<sup>2</sup>

#### SUBSECTION (7).—*Exempted Securities.*

**669.** By s. 47 of the Finance (No. 2) Act, 1915,<sup>3</sup> the Treasury was empowered for a limited period to issue securities for the purpose of raising money, with a special condition that neither the capital nor the interest should be liable to any taxation so long as the securities were in the beneficial ownership of persons neither domiciled nor ordinarily resident in the United Kingdom, and securities issued with such a condition are exempt accordingly. The reference in the section in question to persons not domiciled in the United Kingdom was withdrawn by the Finance Act, 1916,<sup>4</sup> so far as concerns income tax and super-tax, but it still remains in force so far as death duties are concerned. In relation to deaths since the 31st March 1923, the expression "the United Kingdom" must be interpreted as comprising Great Britain and Northern Ireland only.<sup>5</sup> To benefit from the terms of the section at the present time, the deceasing owners of any of the relative securities, so far as representing assets situate in Great Britain, must accordingly have been neither domiciled nor ordinarily resident in Great Britain or Northern Ireland. The ownership regarded is, however, the beneficial (and so not necessarily the titular) ownership. The decision under-noted<sup>6</sup> shews what is regarded as sufficient evidence of being "ordinarily resident."

**670.** The principal securities now current affected by this exemption are the 4 per cent. War Loan 1929–42, the 5 per cent. War Loan 1929–47,

<sup>1</sup> Para. 650, *supra*.

<sup>2</sup> *Lord Advocate v. Gunning's Trs.*, 1902, 39 S.L.R. 534; (O.H.) 9 S.L.T. 403.

<sup>3</sup> 5 & 6 Geo. V. c. 89.

<sup>4</sup> 6 & 7 Geo. V. c. 24.

<sup>5</sup> The Irish Free State (Consequential Adaptation of Enactments) Act, 1923 (S.R. & O., 1923, No. 405).

<sup>6</sup> *Peel v. Inland Revenue*, 1928, S.L.T. 97—a case on Income Tax; and see cases there referred to.

the 4 per cent. Funding Loan 1960–90, 4 per cent. Victory Bonds, and certain issues of 4 per cent. and 5 per cent. National War Bonds and War Savings Certificates. Under s. 63 of the Finance Act, 1916,<sup>1</sup> securities issued under Treasury authority in the United States of America by local authorities in the United Kingdom as then constituted are similarly exempted from taxation.

#### SUBSECTION (8).—*Miscellaneous.*

**671.** Under s. 8 (1) exemption is conferred (by continuation of the “existing law and practice”) on the property of common seamen, marines, or soldiers who are slain or die in the service of His Majesty, and no stipulation is made that the death should be due to military operations, as in the case of remissions.<sup>2</sup> The same section covers certain sums under £100 not requiring confirmation, which were in that position under the previous practice, mainly arrears of Army pay or pension, sums in friendly societies payable to nominees, and the like. Advowsons or church patronage not liable to Succession Duty under s. 24 of the Succession Duty Act, 1853,<sup>3</sup> *i.e.* until sold, are exempted from Estate Duty by s. 15 (4), and a sale of such by a life-tenant was held not to operate to make Estate Duty payable retrospectively.<sup>4</sup> The exemption of annuities not exceeding £25, and certain other pensions and annuities, and the exclusion of immoveable property abroad, as such, have been already dealt with.<sup>5</sup> There is no exemption from Estate Duty as regards property falling to the Crown as *ultimus hæres*. Gifts in reduction of the National Debt are exempt<sup>6</sup> as also is property gifted<sup>7</sup> under directions validated by s. 9 of the Superannuation, etc. (Validation) Act, 1927.<sup>8</sup>

#### SECTION 4.—RATE OF DUTY PAYABLE.

##### SUBSECTION (1).—*Aggregation.*

**672.** It is laid down by s. 4 that, for determining the rate of Estate Duty to be paid on any property passing on the death, all property so passing in respect of which Estate Duty is leviable is to be aggregated so as to form one estate, duty being levied at the proper graduated rate on the principal value of the estate so ascertained. Two exceptions only were made by that section, one in favour of property passing in which the deceased “never had an interest,” and the other in favour of property which passed under a disposition not made by the deceased to some person other than the wife or husband or lineal ancestor or

<sup>1</sup> 6 & 7 Geo. V. c. 24.

<sup>2</sup> See *ante*, para. 634, as to general conditional remissions first introduced in 1900 in regard to persons killed in war. The effects of common seamen, marines, and soldiers dying in the service of the Sovereign were exempted from Inventory Duty by the Stamp Act, 1815 (55 Geo. III. c. 184), and this provision has since been extended to airmen by the Air Force (Application of Enactments) (No. 3) Order, 1918 (S.R. & O., 1918, No. 652).

<sup>3</sup> 16 & 17 Vict. c. 51.

<sup>4</sup> *Attorney-General v. Peek*, [1913] 2 K.B. 487 (C.A.).

<sup>5</sup> See paras. 652, 654, and 655, *supra*.

<sup>6</sup> Finance Act, 1928 (18 & 19 Geo. V. c. 17), s. 30 (3).

<sup>7</sup> *Ibid.*, s. 30 (2).

<sup>8</sup> 17 & 18 Geo. V. c. 41.

descendant of the deceased. The latter exception was, however, abolished in the case of deaths on or after 9th April 1900, by the Finance Act, 1900,<sup>1</sup> which substituted a limited aggregation as regards settled property fulfilling certain conditions; and by the Finance Act, 1907,<sup>2</sup> it was enacted that property fulfilling these conditions should, in the case of deaths on and after 19th April 1907, escape aggregation altogether and be treated as an estate by itself. By the Finance Act, 1927,<sup>3</sup> these provisions are repealed and have no application as regards property passing on deaths after the commencement of that Act, *i.e.* deaths on or after 29th July 1927. The position, therefore, is that, with the undernoted exceptions, of which (ii) is limited to the case of deaths within particular dates, all property on which Estate Duty is leviable requires to be aggregated (though never more than once on the same death, s. 7 (10)) in order to ascertain the rate of Estate Duty payable.

SUBSECTION (2).—*Exceptions from Aggregation.*

(i) *Property in which the Deceased never had an Interest.*

**673.** Property fulfilling this condition is treated, in the case of any death after 1st August 1894, as an estate by itself (s. 4), and bears Estate Duty at the rate appropriate to its own value. To fulfil the condition, the deceased must never have had any interest in it, not even a contingent interest such as that of a person who effects an assurance on his life in favour of his wife or children in such terms that if they should predecease him the insurance moneys would revert to him, although this does not occur;<sup>4</sup> but moneys arising from a policy irrevocably nominated at its inception and without any possibility of reverting to the deceased or his estate would seem to come within the exception. By the provisions of s. 5 (5), in the case of lands or chattels settled by Act of Parliament or royal grant so that none of the persons successively in possession thereof is capable of alienating, the property passing is to be taken as the interest of the successor therein valued as if for Succession Duty, and is property in which the deceased never had an interest.<sup>5</sup> Other classes of cases falling within this exception would appear to be those in which the deceased's death marks the termination of some other person's interest (see s. 2 (1) (b)), and interests such as annuities which first come into existence on the deceased's death.

(ii) *Settled Property Passing under a Disposition made by a Person Dying before 2nd August 1894.*

(a) *Deaths on or after 9th April 1900, and before 19th April 1907.*

**674.** Under the operation of s. 12 (2) of the Finance Act, 1900,<sup>6</sup> where settled property which passes on such a death under a disposition

<sup>1</sup> 63 & 64 Vict. c. 7, s. 12 (2).

<sup>2</sup> 7 Edw. VII. c. 13, s. 16.

<sup>3</sup> 17 & 18 Geo. V. c. 10, s. 51.

<sup>4</sup> See Rowlatt J. in *Attorney-General v. Pearson*, [1924] 2 K.B. at p. 388.

<sup>5</sup> *Nevill v. Inland Revenue Commrs.*, [1924] A.C. 385.

<sup>6</sup> 63 & 64 Vict. c. 7.



made by a person dying before the passing of the principal Act would, if the disponent had died after the commencement of that Act, have been liable to Estate Duty upon his death, the aggregation of such property with other property passing does not operate to enhance the rate of duty payable on the settled property, or upon any other property passing, by more than one-half per cent. in excess of the rate which would have been payable if such settled property had been treated as an estate by itself. Thus, if settled property fulfilling the above conditions were valued at £450, and other property liable to aggregation were valued at £950, neither would be liable at the rate of 3 per cent. which full aggregation would involve, but the former would bear  $1\frac{1}{2}$  per cent., being one-half per cent. more than the 1 per cent. which its value as an estate by itself would warrant, and the latter would bear  $2\frac{1}{2}$  per cent., being one-half per cent. more than the rate which would have been appropriate to property valued at £950 if the settled property had been treated as an estate by itself.

(b) *Deaths on or after 19th April 1907, and before 29th July 1927.*

**675.** Under the operation of s. 16 of the Finance Act, 1907,<sup>1</sup> where settled property passes on such a death under a disposition made by a person dying before the passing of the principal Act, and such property would, if the disponent had died after the commencement of that Act, have been liable to Estate Duty upon his death, it is to be treated as an estate by itself. It is thus excluded entirely from aggregation, bearing duty only at the rate appropriate to its own value, and having no effect on the rate of duty payable on any other property passing.

**676.** These provisions being limited to property passing under settlements made prior to 2nd August 1894 by persons who in fact died before that date, it might have been thought that the hypothetical liability to duty, if the settlor had survived that date, postulated by the statutes was intended to be a liability in similar circumstances. It has been decided, however, that nothing but the death of the settlor is to be projected forward—a construction which brings about some anomalies.<sup>2</sup> It is necessary, however, that the property should pass under the original disposition, and not under a resettlement by which the original trusts may have been confirmed and restored,<sup>3</sup> or under deeds of entail executed by the trustees of the original settlement,<sup>4</sup> and it has been held that the acquiescence of an appointee in an appointment which was *ultra vires* rendered the trusts of the invalid appointment his disposition, and involved aggregation.<sup>5</sup> Property passing by the

<sup>1</sup> 7 Edw. VII. c. 13.

<sup>2</sup> *Attorney-General v. Thynne*, [1914] 1 K.B. 351; adopting the same view as had already been taken in the Irish case of *Edgeworth v. Inland Revenue Commrs.*, [1912] 2 I.R. 606.

<sup>3</sup> *Parr v. Attorney-General*, [1926] A.C. 239.

<sup>4</sup> *Lord Advocate v. Colquhoun's Trs.*, 1924 (O.H.), S.L.T. 341.

<sup>5</sup> *Colquhoun's Trs. v. Lord Advocate*, 1918 (O.H.), 2 S.L.T. 83.

cessor of courtesy or terce may be treated as settled property in this connection (s. 23 (19)).

(iii) *Non-settled Estate not exceeding £1000.*

**677.** By s. 16 (3) it is provided that where the net value of the property liable to Estate Duty, exclusive of property settled otherwise than by the will of the deceased, does not exceed £1000, such property is not to be aggregated with any other property, but forms an estate by itself. The terms of the above exclusion do not cover donations *mortis causa* or absolute *inter vivos* gifts, and it may be doubted whether they include property held on joint destinations with survivorship, joint annuities, etc. In case of doubt, however, the view most favourable to the taxpayer is generally, in practice, conceded, as is also done as regards the case of vested reversionary interests in settled property.

(iv) *Timber: Works of Art: Death in War.*

**678.** It should be noted in this connection that the value of timber, trees, wood, or underwood is not, in the case of a death on or after 30th April 1909, taken into account in fixing the rate of Estate Duty payable,<sup>1</sup> nor are works of art on which duty is remitted by the Treasury.<sup>2</sup> Works of art exempted till sold are liable when sold, on the basis that the collection exempted forms an estate by itself.<sup>2</sup> Where property passes more than once owing to death caused by the war, and duty is remitted on the second or any subsequent death, the property is not to be aggregated with any other property passing on such death.<sup>3</sup>

(v) *Property, the Estate Duty on which has been Commuted.*

**679.** It has been held<sup>4</sup> that property on which the Estate Duty expectantly payable on a death has been commuted in terms of s. 12 prior to the death<sup>5</sup> cannot be aggregated with other property passing on the death, when it actually occurs, so as to enhance the rate of duty payable on such other property.

SUBSECTION (3).—*Rates of Duty in Normal Cases.*

**680.** These were originally fixed, as regards property passing on deaths after 1st August 1894, by s. 17 of the principal Act, but they have been amended (1) by s. 12 of the Finance Act, 1907,<sup>6</sup> and First Schedule as regards deaths on or after 19th April 1907; (2) by s. 54 of the Finance (1909–10) Act, 1910,<sup>7</sup> and Second Schedule as regards deaths on or after 30th April 1909 (and that although the Act only

<sup>1</sup> See para. 684, *infra*.

<sup>2</sup> See para. 632, *supra*.

<sup>3</sup> Death Duties (Killed in War) Act, 1914 (4 & 5 Geo. V. c. 76), s. 2 (1).

<sup>4</sup> *Attorney-General v. Howe*, 1925, 133 L.T. 801 (C.A.).

<sup>5</sup> See paras. 759 *et seq.*, *infra*.

<sup>6</sup> 7 Edw. VII. c. 13.

<sup>7</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

became law in 1910); <sup>1</sup> (3) by s. 12 of the Finance Act, 1914,<sup>2</sup> and First Schedule as regards deaths on or after 16th August 1914; (4) by s. 29 of the Finance Act, 1919,<sup>3</sup> and Third Schedule as regards deaths on or after 31st July 1919; and (5) by s. 22 of the Finance Act, 1925,<sup>4</sup> and Fourth Schedule, the last of which contains the rates now enforceable in the case of all persons dying on or after 30th June 1925. The tables of these rates are too voluminous to be printed here, with the exception of the rates now current, but they are given in full in the official Form N issued by the Estate Duty Office, and in the Parliament House Book under title "Death Duties." In the case of deaths on or after 9th April 1900 the duty is assessed on the exact net amount of the estate.<sup>5</sup>

**681.** The rates of Estate Duty applicable in the case of deaths on and after 30th June 1925 are :

Where the Principal Value of the Estate		Rate per cent.	Where the Principal Value of the Estate		Rate per cent.
£	£	£	£	£	£
Exceeds 100 and does not exceed 500		1	Exceeds 75,000 and does not exceed 85,000		18
" 500 "	1,000	2	" 85,000 "	100,000	19
" 1,000 "	5,000	3	" 100,000 "	120,000	20
" 5,000 "	10,000	4	" 120,000 "	140,000	21
" 10,000 "	12,500	5	" 140,000 "	170,000	22
" 12,500 "	15,000	6	" 170,000 "	200,000	23
" 15,000 "	18,000	7	" 200,000 "	250,000	24
" 18,000 "	21,000	8	" 250,000 "	325,000	25
" 21,000 "	25,000	9	" 325,000 "	400,000	26
" 25,000 "	30,000	10	" 400,000 "	500,000	27
" 30,000 "	35,000	11	" 500,000 "	750,000	28
" 35,000 "	40,000	12	" 750,000 "	1,000,000	29
" 40,000 "	45,000	13	" 1,000,000 "	1,250,000	30
" 45,000 "	50,000	14	" 1,250,000 "	1,500,000	32
" 50,000 "	55,000	15	" 1,500,000 "	2,000,000	35
" 55,000 "	65,000	16	" 2,000,000 "	.. ..	40
" 65,000 "	75,000	17			

#### SUBSECTION (4).—*Marginal Relief.*

**682.** The Finance Act, 1914<sup>2</sup> introduced, by s. 13 (1), a system of relief where the margin above the limit of value for any particular rate was small, by providing that the amount payable under the scale of rates should be reduced where necessary, so as not to exceed the highest amount of duty which would be payable at the next lower rate, plus the amount by which the value of the estate exceeds the value on which the highest amount of duty would be payable at such lower rate. The effect of this provision is best seen in an example, *e.g.* the rate now applicable to an estate of £21,100 is by the current scale of rates 9 per cent., or £1899, but duty is assessable on the above principle at 8 per cent. on £21,000 plus the £100 by which the estate exceeds £21,000,

<sup>1</sup> *Lord Advocate v. Clark's Trs.*, before Lord Cullen in Outer House on 24th December 1910 (not reported).

<sup>2</sup> 4 & 5 Geo. V. c. 10.

<sup>3</sup> 9 & 10 Geo. V. c. 32.

<sup>4</sup> 15 & 16 Geo. V. c. 36.

<sup>5</sup> Finance Act, 1900 (63 & 64 Vict. c. 7), s. 13 (1).



the limit of the 8 per cent. rate, making £1780 in all. It appears that the "estate" to which the section refers is the aggregated estate on which the rate of duty depends, and the abatement in duty accordingly requires to be apportioned among the various items making up that "estate." It is not seen how the proceeds of sales of timber, which escape aggregation but are liable at the rate due to the principal value of the estate, can benefit by the provision. The section gives no date for its operation, but can only have application where duty becomes legally due after the date of the commencement of the Act—31st July 1914.

#### SUBSECTION (5).—*Agricultural Value.*

**683.** In the case of deaths on or after 30th June 1925, where an estate passing comprises or consists of agricultural property within the meaning of s. 22 (1) (g) of the principal Act, *i.e.* of agricultural land, pasture, and woodland, with the cottages, buildings, and houses appropriate thereto, the Estate Duty to be charged on the "agricultural value" is to be at the appropriate rate payable under the Finance Act, 1919,<sup>1</sup> and only upon the "excess principal value" (being the amount by which the total principal value exceeds the "agricultural value") at the appropriate rate payable under the Finance Act, 1925.<sup>2</sup> The "agricultural value" is defined as the value which the property would bear if subject to a perpetual covenant prohibiting its use otherwise than as agricultural property, decreased by the value of any timber, trees, wood, or underwood growing thereon,<sup>3</sup> and mortgages, debts, or incumbrances deductible are to be rateably apportioned.<sup>4</sup> The effect of this provision, which operates where the value of the aggregated estate is between £12,500 and £1,000,000, is that two different rates of duty may be payable on property thus notionally severed into "agricultural value" and "excess principal value." Where a landed estate consists solely of farms and a mansion-house and policies, the whole value may apparently be regarded as agricultural, but the case is different where the question of feued areas or of feuing or sporting value enters into the principal value; and it would seem that the benefit of the provision is lost where personal ownership is altered into ownership through the medium of a company, as what passes in such circumstances on the death is a holding of shares in the company, and not the land as such. Timber is in any case excluded from the principal value,<sup>5</sup> but as it is also excluded from "agricultural value," sales of timber will require to bear duty at the rates imposed by the Finance Act, 1925.<sup>6</sup>

#### SUBSECTION (6).—*Timber.*

**684.** Where an estate, passing on the death of a person on or after 30th April 1909, comprises land on which timber, trees, wood, or

<sup>1</sup> 9 & 10 Geo. V. c. 32.

<sup>3</sup> *Ibid.*, s. 23 (2).

<sup>5</sup> Finance Act, 1912 (2 & 3 Geo. V. c. 8), s. 9.

<sup>2</sup> 15 & 16 Geo. V. c. 36, s. 23 (1).

<sup>4</sup> *Ibid.*, s. 23 (3).

<sup>6</sup> 15 & 16 Geo. V. c. 36.

underwood are growing, the value thereof is not taken into account in estimating the principal value, and Estate Duty is not payable thereon, but Estate Duty is payable at the rate due to the principal value of the estate on the net moneys, after deducting all necessary outgoings from the date of the death, which may from time to time be received from sales of timber when felled or cut during the period which elapses until the land again passes on death.<sup>1</sup> It is provided, however, that if the timber, etc. are sold, either with or apart from the land on which they are growing, the Estate Duty which would have been payable on the principal value thereof but for the above provision shall become payable under deduction of any duty paid on prior sales.<sup>2</sup> It is considered that "necessary outgoings" include the cost of replanting the cleared area, or (probably) a comparable area in an approved scheme of replanting; but the deduction of such outgoings is under the statute permissible only against sales of timber when felled or cut and not against sales of standing timber either with or apart from the land. These provisions have no application in the case of deaths prior to 30th April 1909, in which cases the timber is simply valued and paid on as part of the estate. Timber is excluded from "agricultural value,"<sup>3</sup> and it should be remarked that the value to be excluded from a present charge of duty is the value at the death of the timber *qua* timber, but not the amenity value thereof as enhancing the value of the estate as a whole.

#### SUBSECTION (7).—*Small Estates.*

**685.** Where the gross value of the property, heritable and moveable, in respect of which Estate Duty is payable on the death of the deceased, exclusive of property settled otherwise than by the will of the deceased, does not exceed £300, a fixed duty of 30s., and where it does not exceed £500, a fixed duty of 50s., may be paid in place of the *ad valorem* duty on the net estate according to the scale (s. 16 (1)). This section, as applied to Scotland by s. 23 (7), makes applicable to an estate not exceeding £500 gross, the provisions of s. 34 of the Customs and Inland Revenue Act, 1881,<sup>4</sup> which itself extends the provisions of the Intestates' Widows and Children (Scotland) Act, 1875,<sup>5</sup> and the Small Testate Estates (Scotland) Act, 1876,<sup>6</sup> as amended by the Sheriff Courts (Scotland) Act, 1876,<sup>7</sup> enabling an applicant for confirmation to obtain this by application to the Sheriff-Clerk of the county of the domicile, at fixed fees. If the fixed Estate Duty is paid within a year from the death, no interest is payable (s. 16 (5)), but if not so paid, interest is charged in the usual way from the date of death. By the Executors (Scotland) Act, 1900, s. 9,<sup>8</sup> it was provided that Inland Revenue officers

<sup>1</sup> Finance Act, 1912 (2 & 3 Geo. V. c. 8), s. 9, taking effect in substitution for Finance (1909-10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 61 (5), first paragraph.

<sup>2</sup> Proviso to s. 61 (5).

<sup>3</sup> See para. 683, *supra*.

<sup>4</sup> 44 & 45 Vict. c. 12.

<sup>5</sup> 38 & 39 Vict. c. 41.

<sup>6</sup> 39 & 40 Vict. c. 24.

<sup>7</sup> 39 & 40 Vict. c. 70.

<sup>8</sup> 63 & 64 Vict. c. 55.

appointed for the purpose should assist applicants for title to small estates in the preparation of inventories, etc., but officers of Customs and Excise were substituted in 1909 and now fulfil that function.

**686.** The gross value<sup>1</sup> is the value at the time of the death without any deduction except that provided for by s. 61 (2) of the Finance (1909–10) Act, 1910,<sup>2</sup> viz. a charge securing unpaid purchase-money or money borrowed to pay purchase-money. But it is thought that an extant burden which affected the property when the deceased acquired it should be allowed, as the deceased had never owned more than the property subject to the charge. If the fixed duty has been paid and it is afterwards found that the gross value is in excess of the figure stated, *ad valorem* duty is payable without return of the fixed duty being made (s. 16 (1) embodying s. 35 of the Customs and Inland Revenue Act, 1881);<sup>3</sup> but if the Commissioners are satisfied that there were reasonable grounds for the original estimate of value, they may allow deduction of such fixed duty (Revenue Act, 1903, s. 14).<sup>4</sup>

SUBSECTION (8).—*Protection of Purchasers and Mortgagees of Interests in Expectancy.*

**687.** Where an interest in expectancy has, prior to the 2nd August 1894, been *bona fide* sold or mortgaged for full consideration in money or money's worth, no other duty is payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if the principal Act had not passed; and in the case of a mortgage, any higher duty payable by the mortgagor ranks as a charge subsequent to that of the mortgagee (s. 21 (3)). Purchasers cannot in such circumstances be asked to pay any Estate Duty, and mortgagees cannot have it "come in front of their interest,"<sup>5</sup> but the provision confers no relief on the mortgagor, and the full value of the property passing comes in for aggregation. The protection is limited to duty payable "when the interest falls into possession," and does not in terms apply to duty payable on the passing from one liferenter to another where the ultimate reversioner is still excluded from possession, but such a case is equitably adjusted.<sup>6</sup> Similar provisions protecting purchasers and mortgagees of expectancies from any increased amount of duty legislated for after the sale or mortgage has been effected are contained in the Finance Act, 1900;<sup>7</sup> the Finance Act, 1907;<sup>8</sup> the Finance (1909–10) Act, 1910;<sup>9</sup> the Finance Act, 1914;<sup>10</sup> the Finance Act, 1919;<sup>11</sup> the Finance Act,

<sup>1</sup> As to the limitation of the value of heritable property for determining the gross value in this connection, see para. 692, *infra*.

<sup>2</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>3</sup> 44 & 45 Vict. c. 12.

<sup>4</sup> 3 Edw. VII. c. 46.

<sup>5</sup> Per Kennedy J. in *In re Vernon*, [1901] 1 K.B. at p. 304.

<sup>6</sup> See *In re Reversionary Interest Society; Attorney-General v. Walker*, Times, 14th May 1896.

<sup>7</sup> 63 & 64 Vict. c. 7, s. 12 (1).

<sup>8</sup> 7 Edw. VII. c. 13, s. 12.

<sup>9</sup> 10 Edw. VII. and 1 Geo. V. c. 8, s. 64.

<sup>10</sup> 4 & 5 Geo. V. c. 10, s. 16.

<sup>11</sup> 9 & 10 Geo. V. c. 32, s. 29.



1925;<sup>1</sup> and the Finance Act, 1927.<sup>2</sup> The Commissioners may commute the duty presumptively payable upon an interest in expectancy, putting a "present value" thereon after allowing for contingencies affecting the liability and the rate, and on doing so give a certificate of discharge (s. 12).<sup>3</sup>

## SECTION 5.—VALUATION OF PROPERTY.

### SUBSECTION (1).—*Basis of Valuation.*

**688.** The "principal value" on which duty is levied by s. 1 is declared by s. 7 (5) to be estimated to be the "price" which, in the opinion of the Commissioners, the property would fetch if sold in the open market at the time of the death of the deceased. In the case of any person dying on or after 30th April 1909, the Commissioners are to fix the price of the property according to the market price at the time of the death, and are not to make any reduction on account of the estimate being made on the assumption that the whole property is to be placed on the market at one time, provided, however, that if it be proved to their satisfaction that the property has been depreciated by reason of the death of the deceased that circumstance is to be taken into account (Finance (1909–10) Act, 1910, s. 60 (2)).<sup>4</sup> The price which the property would fetch in the open market is treated as meaning the price which would be obtainable upon a sale open to everyone fully capable of offering the price which the property of the deceased was worth as he himself held it.<sup>5</sup> The "open market" is also treated as distinguishable from an offer to a limited class only,<sup>6</sup> and thus as admitting the possibility of competition by persons for whom the property has a special value;<sup>7</sup> and the sale postulated by the statute is a sale "in such a manner and subject to such conditions as might reasonably be calculated to obtain for the vendor the best price."<sup>8</sup>

**689.** Depreciation otherwise than "by reason of" the deceased's death, is not taken into account, and appreciation is similarly disregarded. A subsequent sale at a price different from the valuation does not necessarily, in the case of subjects of a fluctuating value, imply either under-valuation or over-valuation, as the market may have changed radically, or the sale be accompanied by adventitious circumstances;<sup>9</sup> and where stock had a market value at the time of

<sup>1</sup> 15 & 16 Geo. V. c. 36, s. 22.

<sup>2</sup> 17 & 18 Geo. V. c. 10, s. 51.

<sup>3</sup> See para. 759, *infra*.

<sup>4</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>5</sup> This follows the line taken by the Irish case of *Attorney-General (I.) v. Jameson*, [1905] 2 I.R. 218.

<sup>6</sup> Per Swinfen Eady L.J. in *Inland Revenue Commrs. v. Clay and Buchanan*, [1914] 3 K.B. 466, at p. 475, a case on the Land Values Duties.

<sup>7</sup> Per the Master of the Rolls, in the same case, at p. 472; and see also *Glass v. Inland Revenue Commrs.*, 1915 S.C. 449.

<sup>8</sup> Per Sankey J. in *Ellesmere v. Inland Revenue Commrs.*, [1918] 2 K.B. 735. The remarks of Lord Low in *Craiks, Ltd. v. Forfar Assessor*, 1909 S.C. 658, on the question of "forced sale" may also be referred to.

<sup>9</sup> As in *Inland Revenue Commrs. v. Marr's Trs.*, 1906, 44 S.L.R. 647; (O.H.) 14 S.L.T. 585.

accounting for the duty, executors could not claim a return in respect that it turned out eventually to be worthless.<sup>1</sup>

**690.** As "price" means gross and not net price, the expenses of sale cannot be deducted, except as regards additional expenses in the case of foreign property (s. 7 (3)). But even in the case of property in Great Britain, if money has been expended in such a way as to result in a sale at a higher value than would otherwise have been realised, that circumstance may be taken into account in fixing any valuation based on the sale price obtained. It should be added that the price at which a testator gives by his will an option to acquire property is not necessarily its value for duty purposes.<sup>2</sup>

**691.** In ascertaining the proportion of rents due to a deceased person in Scotland, the calculation is made from the last legal term, not the removal term.<sup>3</sup> The value for Estate Duty purposes of an assurance policy on the life of a person other than the deceased is its saleable value, which is not necessarily the price the Insurance Company would pay for its surrender, the Company's quotation not normally taking into account the state of health of the life assured.

#### SUBSECTION (2).—*Heritable Property.*

**692.** In applying the above principles to the case of heritable property, it requires to be kept in view that the special provision in s. 7 (5) that the principal value of agricultural property as defined in s. 22 (1) (g) was not to exceed twenty-five times its annual value as assessed under Schedule A of the Income Tax Acts, after making the deductions allowed under the Succession Duty Act, 1853,<sup>4</sup> but not in that assessment, and a deduction not exceeding 5 per cent. for expenses of management, is abolished by the Finance (1909-10) Act, 1910,<sup>5</sup> in the case of persons dying on or after 30th April 1909, except for determining the gross or net value for the purpose of s. 16 of the principal Act.<sup>6</sup> Further, the Act of 1910<sup>7</sup> abolishes as regards this type of property the normal mode of appeal provided by s. 10 of the principal Act, and enacts instead that any person aggrieved by the decision of the Commissioners as to the value may appeal in the special manner prescribed by the 1910 Act in regard to the duties on land values thereby imposed, viz. to a referee.<sup>8</sup> A special limitation is imposed by the Finance Act, 1911, s. 18,<sup>9</sup> that in valuing cottages employed solely for agricultural purposes, no account shall be taken of the fact that these may be suitable for the residential purposes of any persons other than agricultural labourers, etc. on the estate. A *pro indiviso* share of property should be valued

<sup>1</sup> *Wishart v. Lord Advocate*, 1880, 8 R. 74, a case on the Inventory Duty.

<sup>2</sup> *Lord Advocate v. Wood's Trs.*, 1910 (O.H.), 1 S.L.T. 186.

<sup>3</sup> *Balfour's Exrs. v. Inland Revenue Commrs.*, 1909 S.C. 619.

<sup>4</sup> 16 & 17 Vict. c. 51.

<sup>5</sup> 10 Edw. VII. and 1 Geo. V. c. 8, s. 60 (1).

<sup>6</sup> *Ibid.*, s. 61 (1); and see para. 686, *supra*.

<sup>7</sup> By s. 60 (3) thereof.

<sup>8</sup> As to this procedure, see para. 751, *infra*.

<sup>9</sup> 1 & 2 Geo. V. c. 48.

independently notwithstanding that the successor already owns the other interest in the property.<sup>1</sup>

**693.** The value for duty of heritable property requires to include such adjuncts as minerals, sporting rights, fishings, etc.; but not timber, except in the case of deaths before 30th April 1909.<sup>2</sup> The "vacant possession" of a house which ensues on the death of a person who both owns and occupies it is a factor to be considered, even although the trusts of his will prevent a sale.<sup>3</sup> The fact that property is "licensed" should be disclosed and the terms of any lease stated. Some interesting remarks on the question of the value of licensed premises will be found in the undernoted case.<sup>4</sup> The value of unexhausted manures is not the property of a tenant farmer passing to his executors.<sup>5</sup>

**694.** Lands settled by Act of Parliament or royal grant in the manner described in s. 5 (5) are to be valued in like manner as for Succession Duty—that is, at the value (per the Schedule to the Succession Duty Act, 1853)<sup>6</sup> of an annuity equal to the annual value of the property.<sup>7</sup>

#### SUBSECTION (3).—*Powers of Commissioners.*

**695.** The value for Estate Duty is to be ascertained by the Commissioners by such means as they think fit, and any person authorised by them to inspect property must be permitted to do so at reasonable times (s. 7 (8)). As regards heritable property, estimates of value submitted by accountable parties are in practice considered by the Valuation Office of the Inland Revenue Department, who, if necessary, discuss the matter directly with such parties or their agents, and report to the Estate Duty Office.

#### SUBSECTION (4).—*Foreign Property.*

**696.** Property situate outside Great Britain requires to be valued on the basis of the rate of exchange into British currency at the time of the death. Deduction is allowed in respect of foreign debts (s. 7 (2));<sup>8</sup> for extra expense up to 5 per cent. in administration or realisation, if incurred (s. 7 (3));<sup>9</sup> and for foreign duties (s. 7 (4)).<sup>10</sup>

#### SUBSECTION (5).—*Interests in Expectancy.*

**697.** Where an estate includes an interest in expectancy, an option is given by s. 7 (6) to the person accountable for the duty to pay the

<sup>1</sup> *Cust v. Inland Revenue Commrs.*, 1917, 91 Estates Gazette, 11.

<sup>2</sup> As to timber, see para. 684, *supra*.

<sup>3</sup> *Dawson v. Inland Revenue Commrs.*, 1921, 97 Estates Gazette, 183.

<sup>4</sup> *Ex parte Ashby's Cobham Brewery Co., Ltd.* re "The Crown," and *Ashby's Staines Brewery Co., Ltd.* re "The Hand and Spear," 1906, 95 L.T. 260. This case arose under the Licensing Act, 1904, but the Commissioners of Inland Revenue, as referees, had to fix a valuation, proceeding "in the same manner . . . as on the valuation of an estate for the purpose of Estate Duty."

<sup>5</sup> *Lord Advocate v. Reid's Trs.* (O.H.), 1921, 2 S.L.T. 38.

<sup>6</sup> 16 & 17 Vict. c. 51.

<sup>7</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 5 (5).

<sup>8</sup> See para. 706, *infra*.

<sup>9</sup> See para. 707, *infra*.

<sup>10</sup> See para. 708, *infra*.



same either (a) with the duty in respect of the rest of the estate, or (b) when the interest falls into possession. In the first case duty is payable on its value as an expectancy at the time of the death, and this value may require in any event to be ascertained for determining the rate of duty payable by the aggregated estate; in the second case the rate of duty requires to be calculated according to the value of the property when it falls into possession, together with the other aggregable property as previously ascertained, and the duty payable is upon its value in possession.<sup>1</sup> Exercise of the option to defer payment is taken as effected by the giving up of an inventory without accounting for the expectancy, unless the executor was ignorant of its existence. An interest in expectancy includes (s. 22 (1) (j)) an interest in remainder or reversion and every other future interest whether vested or contingent, except a reversion expectant on the determination of a lease; and the valuation of those interests may present points of difficulty. The matter may be closed by the submission of an actuarial or other valuation, if such is accepted and paid upon;<sup>2</sup> but not by the item being simply omitted as having no value, or included at a merely nominal figure.<sup>3</sup> If the reversionary interest is liable to be defeated by the exercise of a power of appointment, it may be of no value at the reversioner's death, but this will not be the case if such power could not be exercised adversely owing to incapacity.

SUBSECTION (6).—*Shares in Limited Companies.*

**698.** So far as these are quoted in the official daily lists of the London or Provincial Stock Exchanges, they are valued for duty purposes by reference to the quoted prices on the day of the death, unless this has been carried over for an abnormal time without any transactions having taken place. Where the valuation is based on the quoted price, it is usually taken as one-fourth up from the lower to the higher of the closing prices. If, however, there is evidence of business done on the day of the death, a mean of the prices may be taken. If the day of death happens to be a Sunday or other day for which no prices are available, the latest available quotation is taken, unless doubt is thrown on the accuracy of this by the quotation first given after the death. Where shares, etc. are not officially quoted, values may be evidenced by certificates from brokers or from the secretaries of the companies concerned, but such certificates are not necessarily accepted as conclusive. In such a case, any contemporaneous sales of shares at arm's length are valuable evidence, but the question of value (particularly in the case of private companies) frequently involves a scrutiny of the company's position and prospects, the dividends and bonuses paid over a period of years, and its capital and reserves;

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<sup>1</sup> *In re Eyre*, [1907] 1 K.B. 331.

<sup>2</sup> See *Lord v. Colvin*, 1867, L.R. 3 Eq. 737, a case on Probate Duty.

<sup>3</sup> *Lord Advocate v. Pringle*, 1878, 5 R. 912, a case on Inventory Duty.

and in a recent case<sup>1</sup> it was held that the Commissioners are entitled to regard not only the dividend-paying capacity of the company, but also the capital value of its assets, the Lord Ordinary expressing the view that purchasers of the shares would have given a price related to the capital value of the undertaking on realisation. In the case of companies whose articles restrict transfer of their shares, it appears that the Commissioners are not bound to accept a value based on such restrictive provisions, but may fix the value on the basis of what the shares could be sold for—hypothesising on open market—on the terms that the purchaser would be registered as holder of the shares, subject to the articles of association, including the restricting provisions.<sup>2</sup>

SUBSECTION (7).—*Cesser of an Interest.*

**699.** As has been seen, property in which there is a cesser of interest on death is deemed to pass “to the extent to which a benefit accrues or arises by the cesser” (s. 2 (1) (b)), and by s. 7 (7) it is laid down that the value of the benefit accruing or arising by the cesser shall (a) if the interest extended to the whole income of the property be the principal value of that property, and (b) if the interest extended to less than the whole income of the property be the principal value of an addition to the property equal to the income to which the interest extended. The first case presents no difficulty, but the second has given rise to some questions and has been dealt with in two Scottish cases. The first of these<sup>3</sup> concerned the cesser of an annuity charged on heritable estate by a death on which a further annuity became payable out of the same property for the life of another person, and it was held that duty was payable, in accordance with s. 7 (7) (b), in respect of the cesser of the whole annuity, on the ground that the proper test was the value of the interest enjoyed by the deceasing annuitant, and not the benefit (restricted as it was by the new annuity) which arose to the person in right of the lands. The second case,<sup>4</sup> while directly concerned only in negating the contention that incumbrances should be deducted in valuing the cesser of an annuity payable from heritable property, provided an example of the practical effect of the section, as the Lord President<sup>5</sup> expressed the view that as “the hypothetical addition must be an addition of the same class of property as the property in question, . . . the Crown are right in taking the fourteen years’ purchase, because, admittedly, that is the capital value of this class of property.”

<sup>1</sup> *M’Connell’s Trs. v. Inland Revenue Commrs.*, 1927 (O.H.), S.L.T. 14.

<sup>2</sup> This follows the line taken by the Irish case of *Attorney-General (I.) v. Jameson*, [1905] 2 I.R. 218.

<sup>3</sup> *Inland Revenue Commrs. v. Maclachlan*, 1899, 1 F. 917.

<sup>4</sup> *Lord Advocate v. Henderson’s Trs.*, 1905, 7 F. 963.

<sup>5</sup> 7 F. at p. 970. It should be added that a claim for duty in accordance with these principles was sustained by the Court in *Lord Advocate v. Lyell* (O.H.), before Lord Ormidale, on 31st May 1919, and Lord Blackburn, on 30th June 1920 (not reported).

**700.** It has also been decided<sup>1</sup> that in estimating the net rental required for the ascertainment of the years' purchase to be applied to the annuity, deduction should be taken of public burdens (which was not in dispute) and the cost of ordinary and necessary repairs, which was the point at issue. It should also be in view that an annuity given free of income tax (which implicitly covers super-tax<sup>2</sup>) and charged on property, involves in its cesser the passing of property based on the gross income which after meeting the income tax and super-tax would yield the actual annuity.

#### SUBSECTION (8).—*Inter vivos Gifts.*

**701.** The Commissioners take the view that these require to be valued at the date of death where they are liable to duty as being deemed by the statute to pass on the death (s. 7 (5)).

### SECTION 6.—DEDUCTIONS AGAINST PROPERTY PASSING.

#### SUBSECTION (1).—*Debts and Incumbrances.*

**702.** In determining the value of an estate for the purpose of duty, allowance is made for reasonable funeral expenses and for debts and incumbrances (s. 7 (1)). "Reasonable" funeral expenses presumably are gauged by the deceased's station in life, and in Scotland include mournings for a widow,<sup>3</sup> but while mournings of reasonable amount are allowed in practice also for children residing in the house, allowance is not made of the cost of medical attendance, nursing, etc. in the case of the estate of a married woman, these being "necessaries" for which her husband is liable,<sup>4</sup> nor is the cost of a tombstone allowed.<sup>5</sup> The right to deduct debts and incumbrances (including mortgages and terminable charges (s. 22 (1) (k)) is qualified by the condition that if incurred or granted by the deceased, (a) this must have been *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and they must take effect out of his interest, (b) there must be no right of reimbursement from any other estate or person unless such reimbursement cannot be obtained, and (c) no debt or incumbrance charged upon different portions of the estate can be deducted more than once. Any allowance given is to be against the value of the land or other subjects of property liable thereto.

#### SUBSECTION (2).—*Debts, etc. not Allowable.*

**703.** It will be seen from the above that voluntary debts cannot be deducted,<sup>6</sup> nor can a debt incurred in consideration of marriage,

<sup>1</sup> *Lord Advocate v. Fotheringham*, 1924 S.C. 52.

<sup>2</sup> *Re Doxat*; *Doxat v. Doxat*, 1920, 125 L.T. 60.

<sup>3</sup> See Opinion of Lord Ordinary in *Lord Advocate v. Alexander's Trs.*, 1904, 7 F. 367.

<sup>4</sup> See Walton on Husband and Wife, 2nd ed., at p. 167.

<sup>5</sup> Per Rowlatt J. in *Goldstein v. Salvation Army Assurance Society*, [1917] 2 K.B. at p. 295.

<sup>6</sup> *Lord Advocate v. Gunning's Trs.*, 1902, 39 S.L.R. 534; (O.H.) 9 S.L.T. 403.



as it was incurred for consideration, which, though onerous, was not in money or money's worth,<sup>1</sup> and it does not affect the position that there is a reciprocal provision by the other spouse, as the consideration for both provisions is "not the money but the marriage,"<sup>2</sup> or that there is a discharge of legitim.<sup>3</sup> A loan secured by a reversioner over his reversionary interest does not affect the quantum of the property passing on the death of the liferenter,<sup>4</sup> and it would seem that as a husband is liable without recourse for the income tax and super-tax payable on the joint incomes of himself and his wife in the absence of a separate assessment,<sup>5</sup> deduction is not permissible against a wife's estate in respect of such taxes due at her death.

#### SUBSECTION (3).—*Cautionary Obligations.*

**704.** Liabilities of this nature are not in strictness deductible as they do not fulfil the condition of having been incurred wholly for the deceased's use and benefit, unless a contrary intention can be implied from the provisions of s. 7 (1) (b). The present official practice is, however, to allow a deduction if and when the liability ripens into a debt and is recovered out of the deceased's estate, and it is shewn that the estate can obtain no reimbursement, or only partial reimbursement, from the real debtor or any co-cautioners.

#### SUBSECTION (4).—*Debts affecting Scottish Entails.*

**705.** Following on a decision<sup>6</sup> in which deduction was allowed of bonds securing on a Scottish estate the values of the consents to disentail that estate, it was enacted by s. 57 of the Finance (1909-10) Act, 1910,<sup>7</sup> that in the case of any person dying on or after 30th April 1909, allowance should not be made in respect of any debt or incumbrance which had been created wholly or partially in consideration of the purchase, acquisition, or extinction of an interest in expectancy in any property where the person whose interest had been so purchased, acquired, or extinguished became (under a disposition made by the deceased, or by devolution of law from him, or under his intestacy) entitled to an interest in that property; provided that if part only of the debt or incumbrance was created for the above consideration, or if the person whose interest was purchased, etc. became entitled only to part of the property, only a rateable deduction should be refused. In the case referred to, the interests of the two next heirs of entail, as valued in the disentail proceedings, had been secured by bonds on the disentailed estate, further bonds for unpaid interest being

<sup>1</sup> *Lord Advocate v. Alexander's Trs.*, 1904, 7 F. 367.

<sup>2</sup> Per Lord Kinnear in *Lord Advocate v. Alexander's Trs.*, *supra*, at p. 372.

<sup>3</sup> *Lord Advocate v. Warrender's Trs.*, 1906, 8 F. 371.

<sup>4</sup> *In re Vernon*, [1901] 1 K.B. 297.

<sup>5</sup> See *In re Ward*; *Harrison v. Ward*, [1922] 1 Ch. 517.

<sup>6</sup> *Attorney-General v. Richmond and Gordon*, [1909] A.C. 466.

<sup>7</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

subsequently granted, and the disentailed property passed under a *mortis causa* disposition to the person who had been the heir-apparent. The Crown contended that the provisions of s. 7 (1) (a) applied, in that the bonds were not created for the deceased's own use and benefit, but the House of Lords by a majority decided against this view. The provision which ensued covers only the case where the property passes to a person whose valued interest has been charged on the lands, and has no application if such lands are otherwise destined.

#### SUBSECTION (5).—*Foreign Debts.*

**706.** Allowance is not to be made in the first instance for debts due by the deceased to persons resident outside Great Britain, except out of the value of personal property similarly situated on which duty is paid, unless such debts are contracted to be paid in, or charged on property in, Great Britain; and duty is not to be repaid in respect of such debts except to the extent to which it is shewn to the satisfaction of the Commissioners that the personal property of the deceased in the country of the creditor's residence is insufficient to meet them (s. 7 (2)).<sup>1</sup> This provision is mainly of importance in cases of foreign domicile, where no British Estate Duty is paid on the foreign property, and in such circumstances deduction against the British estate in respect of debts due to foreigners is permissible only (1) if they are contracted to be paid here or charged on property here, or (2) the personal estate in the country<sup>2</sup> in which the creditors reside is unable to meet them. Allowance would not seem to be appropriate in respect of debts properly payable out of foreign realty.

**707.** Where the Commissioners are satisfied that any additional expense in administering or in realising property has been incurred by reason of its being situated outside Great Britain, they may make an allowance from the value of the property on account of such expense not exceeding in any case 5 per cent. on the value of the property (s. 7 (3)).<sup>3</sup> As it has to be shewn that this extra expense has actually been incurred, this allowance is usually made, in practice, by way of return on corrective inventory.

**708.** Where any property passing on the death is situate in a foreign country, and the Commissioners are satisfied that by reason of the death duty is payable thereon in that foreign country, they make an allowance of the amount of that duty from the value of the property (s. 7 (4)). This provision, being in terms applicable to a foreign country, does not include the case of a British Possession, but this nicety is waived in practice as regards British Possessions to which the more favourable provisions of s. 20<sup>4</sup> have not been applied.

<sup>1</sup> As modified by Article 14 (b) of the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80), and Article 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (S.R. & O., 1923, No. 405).

<sup>2</sup> Sec. 7 (2) as adapted by Article 14 (b), *supra*.

<sup>3</sup> As modified by Article 14 (b) and Article 2, *supra*.

<sup>4</sup> See para. 713, *infra*.

## SECTION 7.—ALLOWANCES AGAINST DUTY.

SUBSECTION (1).—*Pre-1894 Duties paid on Settled Property.*

**709.** Where on the death of a person on or after 1st July 1896 Estate Duty becomes payable on property passing under a settlement made by a will or disposition which took effect before the commencement of the principal Act, and before that commencement (1) Legacy or Succession Duty at 1 per cent., (2) Temporary Estate Duty,<sup>1</sup> or (3) the additional Succession Duty imposed by s. 21 of the Customs and Inland Revenue Act, 1888,<sup>2</sup> being  $\frac{1}{2}$  per cent. in the case of issue or lineal ancestors, and  $1\frac{1}{2}$  per cent. for other relationships, has been paid or is payable under the same will or disposition on the capital value of the property, allowance for the duty so paid or payable is to be made as a deduction from the Estate Duty to the extent to which it has been paid or is payable in respect of the property passing (s. 21 of the Finance Act, 1896).<sup>3</sup> By s. 15 of the Finance Act, 1907,<sup>4</sup> this allowance is, instead of the amount previously paid or payable, to be the amount which would have been payable if calculated on the basis of the value of the property liable to Estate Duty, but an option, exercisable on first delivery of the account, is given to the person by whom the duty is payable to require the Commissioners to calculate the deduction under the Act of 1896. The necessary conditions of an allowance are thus: (a) the property must have been settled before 2nd August 1894; (b) the death must have been on or after 1st July 1896; (c) the duties must have been paid or have become payable before 2nd August 1894; (d) the Estate Duty must have become payable under the same will or disposition as that under which the prior duties were paid; and (e) the payment of the prior duties must have been on capital, not on a life-interest basis or by way of commutation arrived at on that basis.<sup>5</sup> Further, the allowance is by way of deduction, and there is no provision for the refunding of any excess.

SUBSECTION (2).—*Settlement Estate Duty previously Paid.*

**710.** On the first occasion on which Estate Duty becomes payable under the operation of s. 14 of the Finance Act, 1914<sup>6</sup> (which abolished the relief given to settled property and Scottish entailed estate),<sup>7</sup> the amount of any Settlement Estate Duty paid in respect of that property is allowed against the Estate Duty payable on that occasion, and if it exceeds that amount the excess is repaid to the estate, and in addition a sum equal to simple interest on the said amount of Settlement Estate Duty, calculated at the rate of 3 per cent. from 15th August 1914 (4 per cent. is allowed in practice for any period subsequent to 30th July

<sup>1</sup> See para. 617, *supra*.<sup>2</sup> 51 & 52 Vict. c. 8.<sup>3</sup> 59 & 60 Vict. c. 28.<sup>4</sup> 7 Edw. VII. c. 13.<sup>5</sup> *In re Foley*, Times, 18th May 1898.<sup>6</sup> 4 & 5 Geo. V. c. 10.<sup>7</sup> See paras. 658 and 661, *supra*.



1919, see s. 30 of the Finance Act, 1919<sup>1</sup>) up to the date of the occasion, is paid to the several persons or their representatives who would have been entitled to the income arising from that amount if that amount had on 15th August 1914 been added to the capital of the settled property, such interest being divided amongst those persons or their representatives according to the several interests they would have had in that income. This allowance cannot be claimed if the Estate Duty is payable apart from the provisions of the 1914 Act, and a claim for it was disallowed by the Court<sup>2</sup> to the extent that entailed estate had been disentailed before the passing.

**711.** Questions have arisen as to the incidence of the benefits conferred by the above provision. In one case,<sup>3</sup> notwithstanding that the Settlement Estate Duty had been paid out of residue on a settled bequest given duty-free, it was held that the allowance required to be given against the Estate Duty subsequently paid out of the bequest itself, and did not fall to be refunded to the residuary estate; and in another,<sup>4</sup> that where a settled residue subject to an annuity passed on the death of the liferenter to the annuitant and to fiars, the annuitant's liability for interest<sup>5</sup> on a proportion of the duty fell to be proportionately reduced. The same cases dealt with the allocation of the interest payable by the Crown, and in the former it was held that the payment fell to the representatives of the liferenter of the settled bequest, notwithstanding that the duty had been borne by residue, and the latter decided that the interest payable by the Crown as at the liferenter's death belonged to the liferenter's representatives, and that the further interest which would be payable by the Crown when the fund held to meet the original annuity passed on the annuitant's death would fall to the annuitant's representatives.

#### SUBSECTION (3).—*Estate Duty paid in Northern Ireland.*

**712.** In terms of s. 28 of the Government of Ireland Act, 1920,<sup>6</sup> in the case of deaths since the 21st November 1921, where Estate Duty, or any duty in the nature of Estate Duty, is payable in Northern Ireland in respect of property there situate, an allowance may be claimed of a sum equal to the amount of that duty against the Estate Duty payable in Great Britain in respect of that property on the same death. The arrangement is reciprocal.

#### SUBSECTION (4).—*Duties paid in certain British Possessions.*

**713.** Where the Commissioners are satisfied that in a British Possession brought within the scope of the section by Order in Council duty

<sup>1</sup> 9 & 10 Geo. V. c. 32.

<sup>2</sup> *Lord Advocate v. Moray*, 1919, 2 S.L.T. 258.

<sup>3</sup> *In re Duke of Sutherland*, [1922] 2 Ch. 782.

<sup>4</sup> *In re Booth; Place v. Booth*, [1916] 1 Ch. 349.

<sup>5</sup> As her proportion of the charge of Estate Duty, see *In re Parker-Jervis; Salt v. Locker*, [1898] 2 Ch. 643.

<sup>6</sup> 10 & 11 Geo. V. c. 67.

is payable by reason of a death in respect of any property situate in such Possession and passing on such death, they are to allow a sum equal to the amount of that duty to be deducted from the Estate Duty payable in respect of that property on the same death (s. 20 (1)). Application of the section to a Possession is conditioned on no duty being payable there on property situate here when passing on death or relief being afforded there similar to that afforded by the section (s. 20 (3)),<sup>1</sup> and an Order in Council applying the section may be revoked if these conditions cease to be fulfilled (s. 20 (4)). Under s. 1 of the Foreign Jurisdiction Act, 1913,<sup>2</sup> power is given to apply the section to foreign countries in which for the time being the British Government has jurisdiction, and by s. 45 of the Finance Act, 1922,<sup>3</sup> the Malay States are to be deemed a British Possession for the purposes of the section. The Order in Council "is to be concurrent with the law in the British Possession in question which leads to it being made,"<sup>4</sup> and where that law fulfilled the necessary conditions only as regards deaths after a certain date, the allowance under the section was held<sup>5</sup> to be similarly restricted.

**714.** The section is operative in regard to the following Possessions: Australia (Commonwealth of),<sup>6</sup> Australia (South), Australia (Western), Bahamas, Barbados, Bermudas, British Columbia, British Guiana, Ceylon, Falkland Islands, Fiji, Gambia, Gibraltar, Gold Coast, Grenada, Hong-Kong, India (not including the Feudatory Native States), Jamaica, Labuan, Leeward Islands, Manitoba, Mauritius, New Brunswick, Newfoundland, New South Wales, New Zealand, Nigeria, Nova Scotia, Ontario, Papua, Quebec, St. Lucia, Sierra Leone, Straits Settlements, Tasmania, Trinidad and Tobago, Victoria and the Yukon Territory (Dominion of Canada). As stated in the preceding paragraph, permission was given<sup>7</sup> for the Malay States to be treated as a British Possession in this connection, the Malay States being defined to include the Federated Malay States, certain named Unfederated Malay States, and Brunei, and an Order in Council was issued on 27th June 1927<sup>8</sup> applying the provisions of the section to the Federated Malay States as from the 1st day of January 1925. The Federated Malay States include Perak, Selangor, Negri Sembilan, and Pahang, but the section has not yet been applied to the Unfederated States, or to Brunei. Under the Foreign Jurisdiction Act, 1913,<sup>2</sup> the section is also operative in regard to: East Africa Protectorate (now Kenya), Gambia Protectorate, Nyasaland Protectorate,

<sup>1</sup> As modified by Article 14 (b) of the Government of Ireland (Adaptation of the Taxing Acts) Order, 1922 (S.R. & O., 1922, No. 80), and Article 2 of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923 (S.R. & O., 1923, No. 405).

<sup>2</sup> 3 & 4 Geo. V. c. 16.

<sup>3</sup> 12 & 13 Geo. V. c. 17.

<sup>4</sup> Per Lord Cullen in *Lord Advocate v. Douglas's Exrs.*, *infra*, at p. 217.

<sup>5</sup> *Lord Advocate v. Douglas's Exrs.*, 1912 (O.H.), 1 S.L.T. 216.

<sup>6</sup> The effect of the application of the section to the Commonwealth is that the Federal duty is allowable as well as the duty levied by the individual State if the section has been applied to the latter.

<sup>7</sup> Finance Act, 1922 (12 & 13 Geo. V. c. 17), s. 45.

<sup>8</sup> London Gazette, 1st July 1927, p. 4221.

Southern Rhodesia, Swaziland, Uganda Protectorate, Wei-hai-wei, and Zanzibar.

**715.** Where duty is paid otherwise than in sterling, it requires, for the purposes of the allowance, to be converted into British currency at the rate of exchange on the day of payment. To obtain the allowance a certificate from the Court or a receipt from the Taxing Authority of the British Possession should be produced shewing the amount of duty paid in such Possession and particulars of the assets in respect of which it was paid. Interest is not allowable, and if the duty is based on a figure inclusive of income subsequent to the death (*e.g.* up to the date when title was applied for, as in Indian cases) the duty paid is reduced so as to exclude the proportion applicable to such income, and similarly if the duty paid includes duty on immoveable property not liable to British Estate Duty. The allowance cannot exceed the amount of Estate Duty actually paid in respect of the assets in question. If, as is generally the case, evidence of payment of the Colonial duty cannot be produced when the original inventory is lodged for assessment of duty, the allowance is granted subsequently on Corrective Inventory, but in suitable cases a provisional allowance may be given on the basis of an estimate, on the accounting party undertaking to adjust and vouch the deduction as soon as the Colonial duties have been paid.

**716.** In terms of s. 5 of The Irish Free State (Consequential Provisions) Act, 1922,<sup>1</sup> and Part II. of the Schedule to the Relief of Double Taxation (Irish Free State) Declaration, 1923,<sup>2</sup> where Estate Duty is payable in the Irish Free State by reason of the death of a person dying on or after the 1st April 1923, in respect of any property situate in the Irish Free State and passing on such death, a sum equal to the amount of that duty is allowed to be deducted from the Estate Duty payable in Great Britain in respect of that property on the same death. The arrangement is reciprocal.

#### SUBSECTION (5).—*Consular Court Fees.*

**717.** Allowance is also made, under Treasury instructions, from Estate Duty paid in Great Britain, in respect of fees paid at British Consular Courts having extra-territorial jurisdiction in connection with representation to moveable property within such jurisdiction. In making application for this allowance or for repayment of an amount equal to the fees, the Consular Court Certificate should be submitted, and steps are then taken to have the amount of the fees transferred by the Foreign Office to the Revenue Account.

#### SUBSECTION (6).—*Quick Successions.*

**718.** Where the Commissioners are satisfied that Estate Duty has become payable on any property consisting of land or a business (not

<sup>1</sup> 13 Geo. V. c. 2.

<sup>2</sup> S.R. & O., 1923, No. 406.



being a business carried on by a company) or any interest in land or such a business, passing upon the death of any person, and that subsequently within five years Estate Duty has again become payable on the same property or any part thereof passing on the death of the person to whom the property passed on the first death, the amount of Estate Duty payable on the second death, if it occurs on or after 31st July 1914, in respect of the property so passing, is reduced as follows: where the second death occurs within one year of the first death, by 50 per cent.; where it occurs within two years thereof, by 40 per cent.; where it occurs within three years thereof, by 30 per cent.; where it occurs within four years thereof, by 20 per cent.; and where it occurs within five years thereof, by 10 per cent. Where the value on the second death exceeds the value on the first death, the latter value is substituted for the former in calculating the amount of duty on which the reduction is to be calculated (Finance Act, 1914, s. 15).<sup>1</sup>

**719.** This allowance was intended to apply to (a) "real property," and to (b) "business plant, machinery, stock-in-trade, or goodwill,"<sup>2</sup> and it appears to be applicable, as regards (a), to land passing as land, but not to securities representing the price of land, and, as regards (b), to the business assets of any profession, occupation, or calling, but not the proceeds of sale thereof, nor to any stock, shares, or securities held by the business except so far as these represent normal working capital. A business carried on by any company (which will include a private company) is excluded from the provision. Further, the second passing must be of the property (or interest in property) identified in every respect as the same as that which passed on the prior death; and the relief was refused on the death of a son who had received as part of his share of the residue of his father's estate and had put to the credit of his capital account with the firm a portion of a loan due to the father by the firm in which they were partners.<sup>3</sup> It was also indicated by the Lord President in the same case<sup>4</sup> that the section had no application as regards a charge on landed estate, which accords with the official practice, and the view was indicated that the "interest" referred to in the Statute must be such that the exhaustion of it in paying repeated Estate duties would be detrimental to the landed estate or the business. The allowance is only made on the death of a person to whom the property passed on the first death, and accordingly (1) the percentage allowance cannot be cumulative, and (2) the order in which deaths occur may be important, *e.g.* a passing on the death of a liferenter of settled property shortly after that of a reversioner would obtain no relief on that ground. The relief is as regards Estate Duty only, and any other duty exigible is payable in full.

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<sup>1</sup> 4 & 5 Geo. V. c. 10.

<sup>2</sup> Per House of Commons White Paper, No. 212, dated 5th May 1914.

<sup>3</sup> *Glen v. Inland Revenue Commrs.*, 1926 S.C. 44.

<sup>4</sup> 1926 S.C. at p. 54.

## SECTION 8.—ACCOUNTABILITY AND CHARGE.

SUBSECTION (1).—*The Executor.*

**720.** The “executor” is defined (s. 22 (1) (d)) to mean the executor or administrator of any deceased person, and to include, as regards any obligation under the Act, any person who takes possession of or intermeddles with the personal property of a deceased person; but in the application of the Act to Scotland, it is defined (s. 23 (11)) to mean every person who as executor, nearest of kin, or creditor or otherwise intromits with<sup>1</sup> or enters upon the possession or management of any personal property of a deceased person. In such application also it is provided that the “Inland Revenue Affidavit” referred to in the principal Act means the inventory of the deceased’s estate now required by law (s. 23 (5)), and “on delivering the Inland Revenue Affidavit” means (s. 23 (6)) “on exhibiting and recording a duly stamped inventory as provided by s. 38 of the Probate and Legacy Duties Act, 1808.”<sup>2</sup>

**721.** The executor is required (s. 8 (3)) to specify in appropriate accounts annexed to the inventory, to the best of his knowledge and belief, all the property in respect of which Estate Duty is payable, and he is accountable for the duty on all moveable property wheresoever situate of which the deceased was competent to dispose at his death, but he is not liable for duty in excess of the assets receivable by him as executor. The duty is payable on the lodging of the inventory (s. 6 (2) and s. 23 (6)). The executor may also at the same time pay the Estate Duty on any other property passing and under his control as executor,<sup>3</sup> or even on property not under his control, if the persons properly accountable request him to do so (s. 6 (2)).

**722.** The accountability of the executor as regards all moveable property of which the deceased was competent to dispose is not limited to property which has come into his hands or even to that within his title, but extends to duty on a revocable gift<sup>4</sup> and to foreign personalty left under the administration of a separate set of foreign executors;<sup>5</sup> but his ultimate liability is confined to property which passes to him as executor, as the duty is made a charge on the property itself where this does not pass to the executor as such<sup>6</sup> (s. 9 (1)), and is in such cases to be repaid to him by the trustees or owners of the property (s. 9 (4)), or if necessary the executor can at his own hand sell or burden the property for the purpose of paying the duty (s. 9 (5)).<sup>7</sup> Where

<sup>1</sup> For an example of accountability incurred by a vitious intromitter, see *New York Breweries Co., Ltd. v. Attorney-General*, [1899] A.C. 62, a case on Probate Duty.

<sup>2</sup> 48 Geo. III. c. 149; see para. 615, *supra*.

<sup>3</sup> Per Chitty J. in *In re Meyrick, Meyrick v. Hargreaves*, [1897] 1 Ch. 99, at p. 108.

<sup>4</sup> As in *Inland Revenue v. Gunning's Trs.*, 1907 S.C. 800.

<sup>5</sup> *In re Manchester (Dowager Duchess)*; *Duncannon v. Manchester*, [1912] 1 Ch. 540. A similar decision was given by Lord Cullen in *Lord Advocate v. Douglas's Exrs.* on 31st October 1911. The facts of the case are stated in 1912, 1 S.L.T. 216, but the case is not reported on this point.

<sup>6</sup> See paras. 728 *et seq.*, *infra*.

<sup>7</sup> See para. 729, *infra*.

the executor does not know the amount or value of any property which has passed on the death, he may state in the inventory that such property exists, but that he does not know the amount or value thereof, and that he undertakes as soon as the amount and value are ascertained to bring in an account thereof and to pay any further duty due (s. 6 (3)). As, however, the inventory given up in Scotland requires to be "full and true" (s. 38 of the Probate and Legacy Duties Act, 1808),<sup>1</sup> the executor usually estimates and includes the value of such property as best he can, subject to adjustment on the obtaining of full particulars; and it has been held that he must make full inquiry before deponing to the amount of the estate.<sup>2</sup>

**723.** By s. 16 (1) of the Law of Property Act, 1925,<sup>3</sup> the personal representative, i.e. the executor, (s. 205 (1) (xviii.) of said Act) is made accountable for all death duties payable on the death of the deceased in respect of English land (including settled land) which devolves on him by virtue of any statute or otherwise; but under s. 16 (3) such personal representative has all the powers conferred by statute for raising the duty and expenses,<sup>4</sup> and under s. 16 (5) the ultimate liability of the persons beneficially interested<sup>5</sup> is preserved.

#### SUBSECTION (2).—*Other Persons Accountable.*

**724.** Where the executor is not accountable, every person to whom property passes on the death for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee,<sup>6</sup> guardian, committee, or other person in whom any interest in the property or the management thereof is at any time vested, and every person in whom the same is vested by alienation or other derivative title, is accountable to the Commissioners for the duty, and is to deliver and verify an account within six months of the death (s. 6 (4)) to the best of his knowledge and belief (s. 8 (4)). Every person accountable is also, if required by the Commissioners, to deliver and verify a statement, to the best of his knowledge and belief, of any property believed to form part of the estate, giving particulars and evidence as the Commissioners require (s. 8 (5)).

**725.** This comprehensive clause (8 (4)) puts a liability to account, as regards all property which does not pass to the executor as such, upon both trustees and beneficiaries, and as between these it would seem that the trustees are liable to account in the first instance.<sup>7</sup> The beneficiaries are, however, accountable if an interest in possession passes to them, such as that of a liferenter under a direct *mortis causa* disposition, and this accountability remains in a question with the Crown even if there be trustees. The donee of property gifted within

<sup>1</sup> 48 Geo. III. c. 149.

<sup>2</sup> *In the Goods of Beech*, Times, 9th August 1904.

<sup>3</sup> 15 Geo. V. c. 20.

<sup>4</sup> See para. 729, *infra*.

<sup>5</sup> See paras. 725 and 734, *infra*.

<sup>6</sup> Including, as regards Scotland, a tutor, curator, and judicial factor (s. 23 (13)).

<sup>7</sup> See North J. in *In re Orford*; *Cartwright v. del Balzo*, [1896] 1 Ch. at p. 264.



three years of death is accountable for the duty thereon,<sup>1</sup> as also the assignee of a policy kept up by the deceased and the recipient of a widow's fund or similar annuity provided by him. Alienees, including purchasers in whom the property is vested, are also accountable, unless the purchasers have acquired for valuable consideration without notice of the death (s. 8 (18)), including the case of marriage-contract trustees to whom the successor had assigned the property,<sup>2</sup> and in certain other circumstances a person who is not technically accountable may in reality be so, as requiring to clear property belonging to him from the charge of duty which has arisen as stated below.<sup>3</sup> In England, however, so far as registered land is concerned, a registered disposition in favour of a purchaser operates to vest the estate or interest transferred or created by the disposition free from duty, notwithstanding that notice of a claim for duties may have been noted on the register;<sup>4</sup> and, so far as unregistered land is concerned, a purchaser also takes free from any charge for duty, unless it is registered as a land charge.<sup>5</sup> Works of art, etc. exempted from duty until sold are to be accounted for by the person selling the same, or for whose benefit the same are sold, within one month after the sale (s. 20 (2) of the Finance Act, 1896,<sup>6</sup> as amended by s. 96 (1) and Third Schedule of the Finance (1909-10) Act, 1910).<sup>7</sup> The proceeds of sales of timber are to be accounted for by the owners or trustees of the land as and when such proceeds are received, with interest from the date of receipt (s. 9 of the Finance Act, 1912),<sup>8</sup> and a life-tenant entitled to sell and retain the proceeds is liable similarly to account.<sup>9</sup>

**726.** In the case of settled property there may be apparent conflict as regards accountability, *e.g.* where the deceased, who liferented property which passed on his death in the hands of trustees to another liferenter, had power of disposal of the reversion, the trustees are under the Act accountable for duty on the property passing in their hands, and the deceased's executor is also accountable for duty on the reversionary interest. In such a case it was held<sup>10</sup> that the trustees must account for the duty on the *corpus* of the settled property, and while that decision was overruled by a later case,<sup>11</sup> in which the deceased had an absolute reversion, the point at issue in both cases was rather whether the duty was payable by the executor out of the residuary estate, which went to another person, or by the trustees who would have charged it on the settled funds, than a determination of the liability to account in a question with the Crown; and in practice the accounting is by the trustees of the settled fund.

<sup>1</sup> *In re Crocker; Crocker v. Crocker*, [1916] 1 Ch. 25.

<sup>2</sup> *Morris v. Morris's Trs.*, 1904, 11 S.L.T. 793; and 12 S.L.T. 612.

<sup>3</sup> Para. 728, *infra*.

<sup>4</sup> Land Registration Act, 1925 (15 Geo. V. c. 21), s. 73.

<sup>5</sup> Law of Property Act, 1925 (15 Geo. V. c. 20), s. 17; and Land Charges Act, 1925 (15 Geo. V. c. 22), s. 10. <sup>6</sup> 59 & 60 Vict. c. 28. <sup>7</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>8</sup> 2 & 3 Geo. V. c. 8.

<sup>9</sup> *In re Smyth; Edwards v. Smyth*, [1918] 1 Ch. 118 (C.A.).

<sup>10</sup> *In re Dixon; Penfold v. Dixon*, [1902] 1 Ch. 248.

<sup>11</sup> *In re Avery; Pinsent v. Avery*, [1913] 1 Ch. 208.

**727.** Persons accountable for duty are debtors to the Crown therefor,<sup>1</sup> but nothing in the section (8 (4)) is to render so accountable a person who acts merely as agent or bailiff for another person in the management of property.

SUBSECTION (3).—*Property which does not Pass to the Executor as such.*

**728.** Where property passes to the executor as such, the duty is simply payable out of residue as a necessary administrative expense,<sup>2</sup> and no question of statutory charge arises, but where it does not so pass to him, *i.e.* where he does not get it "*qua* executor" or "*virtute officii*,"<sup>3</sup> a rateable part of the Estate Duty payable, in proportion to the value of the property, is a first charge on the property in respect of which duty is leviable (s. 9 (1)). The question whether property of certain types passes to the executor as such is, therefore, of importance in determining the incidence of the duty, and in the absence of any statutory definition there has been considerable dubiety as to the position. The main difficulty centred round property over which the deceased had exercised a general power of appointment, and this was finally decided in the English Courts—conformably with what appears to be the position under Scots law—by the House of Lords holding that such property did not pass to the executor as such.<sup>4</sup> As regards such property, therefore, and *a fortiori* where the deceased did not exercise the power,<sup>5</sup> although the executor must account for and pay the duty on all personal property of which the deceased was competent to dispose, he recoups himself out of the property and the burden does not fall on residue. The Courts have also been appealed to as regards certain other classes of property, and have held that these do not pass to the executor as such, viz.: (a) real<sup>6</sup> or heritable property (other than English leaseholds);<sup>7</sup> (b) foreign moveable estate outside the title of the British executor;<sup>8</sup> (c) gifts *inter vivos*<sup>9</sup> or *mortis causa*.<sup>10</sup> The duty is not, however, a charge on property situate in a British Possession, while so situate (s. 20 (2)), nor on property in the hands of a *bona fide* purchaser thereof for valuable consideration, without notice (s. 9 (1)).

SUBSECTION (4).—*The Charge of Duty.*

**729.** The nature of the charge imposed by s. 9 (1) appears from s. 9 (3), which provides that the certificate of the Commissioners, issued

<sup>1</sup> Per Vaughan Williams L.J. in *Berry v. Gaukroger*, [1903] 2 Ch. at p. 130.

<sup>2</sup> See *In re Bourne*; *Martin v. Martin*, [1893] 1 Ch. 188, a case on Probate Duty.

<sup>3</sup> Per Buckmaster L.C. in *O'Grady v. Wilmot*, *infra*, at p. 257.

<sup>4</sup> *O'Grady v. Wilmot*, [1916] 2 A.C. 231. <sup>5</sup> *Porte v. Williams*, [1911] 1 Ch. 188.

<sup>6</sup> *In re Palmer*, *Palmer v. Rose-Innes*, [1900] W.N. 9. But as to the liability of an executor to account as regards English land, see para. 723 *supra*.

<sup>7</sup> *In re Culverhouse*, *Cook v. Culverhouse*, [1896] 2 Ch. 251.

<sup>8</sup> *In re Scull*, *Scott v. Morris*, [1917] W.N. 309. But compare *In re Scott*, *Scott v. Scott*, [1916] 2 Ch. 268, where there were only British executors.

<sup>9</sup> *In re Crocker*, *Crocker v. Crocker*, [1916] 1 Ch. 25.

<sup>10</sup> *In re Hudson*, *Spencer v. Turner*, [1911] 1 Ch. 206.

under s. 9 (2), of the Estate Duty paid in accordance with their assessment shall be conclusive evidence that the amount of duty named therein is a first charge on the lands or other subjects of property, after the debts and incumbrances allowed by the Commissioners in assessing the duty. In addition to this provision, however, a special power is conferred by s. 9 (5) on any person authorised or required to pay duty, to raise the amount thereof (with any interest and expenses properly paid or incurred by him) by the sale or mortgage of or a terminable charge on the property; and by s. 9 (6) a person having a limited interest in the property (which includes an heir under a Scots entail)<sup>1</sup> who pays the duty thereon is entitled to the like charge as if the duty paid had been raised by means of a mortgage to him. As was explained by Lord Pearson in a case<sup>2</sup> concerning a Scottish entailed estate, this "carries the scheme of making the duty a 'first charge' a stage further than was done by the Succession Duty Act, by s. 42 [of which] the charge was in favour of the Crown as a security for unpaid duty. By the later Act it is carried forward as a charge in favour of the person paying the duty." It was indicated in that case that the declaration in the section might be sufficient to constitute the charge without further procedure, but the Court considered that s. 9 (5) entitled the petitioner to have the amount of duty "constituted a charge on the lands in conformity with the requirements of the law of Scotland." A similar conclusion was reached<sup>3</sup> as regards ordinary trust property, the Court expressing the view that the terms of s. 9 (5) would appear to be sufficient to enable the petitioners to borrow the amount of the duty on the security of the estate, but granting under the *nobile officium* express authority to do so, on the representation that the petitioners could not obtain a loan without this; and notwithstanding that it was held by the House of Lords<sup>4</sup> that duties paid by an heir of entail became automatically a charge on the estate, the practice is to seek the authority of the Court to charge the lands, so as to get the incumbrance recorded in the Register of Sasines in the usual way. The Court, however, refused its assistance<sup>5</sup> as unnecessary where the heir of entail sought authority to sell in terms of s. 9 (5). The person charging Estate Duty upon the fee of an estate cannot be compelled to accept a terminable charge as opposed to a bond and disposition in security.<sup>6</sup> A trustee having power to invest in real securities may invest on a charge of this nature.<sup>7</sup>

**730.** The section provides also for the raising of the amount of interest and expenses properly paid or incurred. As to interest, this is not properly incurred as between liferenter and fiar so as to be borne by the latter to the indemnity of the former, and so a tenant for life, paying duty on settled realty by instalments, cannot charge the fee

<sup>1</sup> Per Lord Dunedin in *Lord Advocate v. Countess of Moray*, *infra*, at p. 545.

<sup>2</sup> *Laurie, Petr.*, 1898, 25 R. 636.

<sup>3</sup> *Harris's Trs. v. Harris*, 1904, 6 F. 470.

<sup>4</sup> In *Lord Advocate v. Countess of Moray*, [1905] A.C. 531.

<sup>5</sup> *Orr Ewing, Petr.*, 1920 (O.H.), 1 S.L.T. 259. <sup>6</sup> *Turnbull v. Turnbull*, 1910 S.C. 766.

<sup>7</sup> *Trusts (Scotland) Act*, 1921 (11 & 12 Geo. V. c. 58), s. 12 (1).



with the interest on the unpaid instalments,<sup>1</sup> a principle which holds in the case of an heir under a Scots entail.<sup>2</sup> Interest on duty is, however, deducted in estimating the free rental on which younger children's provisions from an entailed estate are based.<sup>3</sup> As regards expenses, the position seems to be as determined in the undernoted case,<sup>4</sup> viz.:—that the expense of settling the duty and the expense of the bond, but not the expense of the application to the Court, are expenses “properly incurred” within the meaning of the section.

**731.** In the case of property inalienably settled by Act of Parliament or Royal Grant,<sup>5</sup> the Estate Duty may (at the option of the accountable party) be treated as a charge on and be raised and paid out of the *corpus* of the property,<sup>6</sup> and the provisions of s. 9 dealing with the charge of Estate Duty and the facilities for raising the same apply. The option in question is exercisable while the duty remains unpaid.<sup>7</sup>

#### SUBSECTION (5).—*Special Provisions as to Scotland.*

**732.** In applying the principal Act to Scotland, it was provided that where a person who is not himself vested in the property is by the Act authorised to raise duty paid by him by the sale or mortgage of the property, he may apply to the Court of Session (*a*) for an order for sale, the Court making provision for recoupment of the duty paid and for disposal of any surplus, and having also power to ordain the person in whom the property is vested to grant any necessary disposition, or to grant authority to the clerk of Court to do so, or (*b*) for an order ordaining the person in whom the property is vested to grant a bond and disposition in security over the property for the amount of the duty in favour of the person who has paid it, or to authorise the clerk to do so, any such bond being valid as a first charge upon the property after any debt or incumbrance for which allowance is given under the Act. Summary diligence is not, however, competent thereupon, and nothing in the provision is to make the duty recoverable at any earlier time than if it had been recovered by direct action against the person ultimately liable (s. 23 (18)).

**733.** This section, apparently subsidiary to s. 9 (5), has application only where the person paying the duty is not vested in the property; but under it the Court granted power<sup>8</sup> to a liferenter, who was also fiduciary *fiar* for his son, to grant in the latter capacity a bond to himself for the duty he had paid. The bond was not permitted to cover expenses,

<sup>1</sup> *In re Howe's Settled Estates*, *Howe v. Kingscote*, [1903] 2 Ch. 69 (C.A.).

<sup>2</sup> *Robertson, Petr.*, 1914 (O.H.), 1 S.L.T. 492.

<sup>3</sup> *Mackintosh v. Mackintosh*, 1913 S.C. 31.

<sup>4</sup> *Farquharson's Trs., Petrs.*, 1915, 2 S.L.T. 176.

<sup>5</sup> See para. 673, *supra*.

<sup>6</sup> Finance Act, 1922 (12 & 13 Geo. V. c. 17), s. 44.

<sup>7</sup> The duty may be treated as unpaid where a sum has merely been deposited with the Commissioners (*In re Abergavenny Settled Estates*, *Abergavenny v. Nevill*, [1926] Ch. 465; following *In re Bolton Estates* (1924) (not reported).

<sup>8</sup> *Menzies, Petr.*, 1903 (O.H.), 10 S.L.T. 636.

as no provision is made therefor in the section, though the Lord Ordinary considered that this was probably an omission, having regard to the terms of s. 9 (5). Where, however, an order for sale is granted, expenses may be allowed out of the price,<sup>1</sup> as in that case the surplus is expressly put at the disposal of the Court.<sup>2</sup> Where entailed estate had been sold, and duty paid by the executor of a deceased heir of entail, he being also the deceased's successor as heir of entail, it was held that he was entitled to an order entitling him to repayment out of the proceeds of sale, with the expenses of the application.<sup>3</sup> Where two contiguous estates destined to the same series of heirs had been valued separately for Estate Duty, and duty had been assessed on them separately, the heir of entail was allowed to charge the *cumulo* amount of duty on the estates jointly.<sup>4</sup>

SUBSECTION (6).—*Incidence of the Charge as between Beneficiaries.*

**734.** In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the Estate Duty may be recovered by the person who has rightfully paid it from the person entitled to any sum charged thereon, whether as capital or as an annuity or otherwise, under a disposition not containing any express provision to the contrary (s. 14 (1)). Any dispute (*i.e.*, from the context, any dispute between parties) as to the proportion of duty may be determined, in Scotland, by application by any person interested, to the Court of Session, or if less than £50 be in dispute, the Sheriff Court (ss. 14 (2) and 23 (1) and (2)).<sup>5</sup> Any person from whom a proportion is recoverable is bound by the accounts and valuations as settled between the person entitled to recover and the Commissioners (s. 14 (3)). The duty is intended by the statute to "fall upon . . . the beneficiaries according to their respective rights and interests."<sup>6</sup>

**735.** A good example of the operation of this provision is found in a case<sup>7</sup> in which the deceased had, in pursuance of an obligation in his son's marriage contract, granted a bond for £30,000 over lands belonging to him. On his death Estate Duty became payable on his estate without deduction of the bond,<sup>8</sup> and the deceased's testamentary trustees who paid the duty were held entitled to recover a rateable

<sup>1</sup> *Mackechnie, Petr.*, 1898 (O.H.), 6 S.L.T. 242; *Turnbull, Petr.*, 1910 (O.H.), 2 S.L.T. 328; *Laurie, Petr.*, 1898, 25 R. 636.

<sup>2</sup> Per the Lord Ordinary in *Menzies, Petr.*, *supra*, explaining his decision in *Mackechnie, Petr.*, *supra*.

<sup>3</sup> *Bedell-Sivright's Curator Bonis*, 1924, S.L.T. 17.

<sup>4</sup> *Callander-Brodie*, 1904 (O.H.), 12 S.L.T. 474.

<sup>5</sup> The procedure in England is regulated by Rules of Court, Order LV, Rule 9 c. (S.R. & O., 1895, No. 603 (L. 35)), but the cases which have arisen under the section in Scotland have been brought by way of Special Case.

<sup>6</sup> Per North J. in *In re Orford (Countess), Cartwright v. del Balzo (Duc)*, [1896] 1 Ch. at p. 263; and see *Berry v. Gaukroger*, [1903] 2 Ch. 116 (C.A.).

<sup>7</sup> *Alexander's Trs. v. Alexander's M.C. Trs.*, 1910 S.C. 637.

<sup>8</sup> Under *Lord Advocate v. Alexander's Trs.*, 1905, 7 F. 367.

portion thereof from the marriage-contract trustees, on the ground that the sum in the bond was "charged" on the estate. The same conclusion was reached by the English Courts where the deceased had charged money sums on real estate in favour of marriage settlement trustees;<sup>1</sup> but where the marriage settlement obligation was unsecured they arrived at a contrary result,<sup>2</sup> as did also the Scottish Courts in a case<sup>3</sup> where annuities and provisions arose on the deceased's death under a special power exercised at the deceased's request by trustees holding settled property. The ground of the last decision was, however, that the deduction of the value of these provisions should not have been disallowed in accounting for duty on the settled property, and the Crown was not represented in the case. Where the estate, after deducting the debts not allowed for duty purposes, is insolvent, the executor would be entitled to recoupment.

**736.** Legacies payable out of real estate<sup>4</sup> or a mixed fund including real estate,<sup>5</sup> or out of settled property passing on the death of a life-tenant,<sup>6</sup> must bear their proportion of Estate Duty, as also must a rent-charge arising out of property which passed on a death to a tenant for life;<sup>7</sup> a widow's terce;<sup>8</sup> property over which the deceased had, but did not exercise, a general power of appointment;<sup>9</sup> and in the case of the bequest of a business under burden of payment of a sum to the trustees for distribution amongst legatees, it was held that such sum had to bear a rateable proportion of the duty.<sup>10</sup> Where a person to whom heritable property passed has died, the incidence of duty thereon as between his next-of-kin and his heir-at-law is a question of circumstances. If still unpaid, it remains a charge on the heritage to the exclusion of the moveable estate,<sup>11</sup> but if it has been paid out of the moveable estate the charge is regarded as extinguished.<sup>12</sup> Where the residuary personal estate is insufficient, Estate Duty is payable in the same order of administration as other testamentary expenses, and so comes out of undisposed of realty in priority to specifically bequeathed personalty.<sup>13</sup> As to the apportionment between capital and income, where a testator's residuary estate is settled on liferenters and fiars, of payments for Estate Duty and interest, see the undernoted case.<sup>14</sup>

<sup>1</sup> *In re Hacket, Hacket v. Gardiner*, [1907] 1 Ch. 385.

<sup>2</sup> *In re Gray, Gray v. Gray*, [1896] 1 Ch. 620.

<sup>3</sup> *Colquhoun's Trs. v. Abercromby*, 1913 S.C. 874.

<sup>4</sup> *Berry v. Gaukroger*, [1903] 2 Ch. 116 (C.A.).

<sup>5</sup> *In re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130.

<sup>6</sup> *In re Power, Power v. Howell*, 1898, 47 W.R. 183.

<sup>7</sup> *In re Parker-Jervis, Salt v. Locker*, [1898] 2 Ch. 643; and see also *In re Portman*, [1924] 2 Ch. 6.

<sup>8</sup> *Ross v. Ross's Trs.*, 1901, 9 S.L.T. 340.

<sup>9</sup> *Porte v. Williams*, [1911] 1 Ch. 188.

<sup>10</sup> *Anderson's Trs. v. Matthew*, 1916 S.C. 299.

<sup>11</sup> *In re Bowerman, Porter v. Bowerman*, [1908] 2 Ch. 340.

<sup>12</sup> *In re Hole, Davies v. Wits*, [1906] 1 Ch. 673 (C.A.) (the case of a lunatic); and *In re Wilson, Wilson v. Clark*, [1916] 1 Ch. 220 (the case of an infant).

<sup>13</sup> *In re Pullen, Parker v. Pullen*, [1910] 1 Ch. 564.

<sup>14</sup> *In re Wills, Wills v. Hamilton*, [1915] 1 Ch. 769.



**737.** Special provision is made by s. 23 (17) for the case of disentail with consent of subsequent heirs. Where the heir of entail in possession has paid Estate Duty in respect of entailed estate which he afterwards disentails, he is entitled to deduct from the money value of the interests of subsequent heirs payable by him for their consents<sup>1</sup> a proper rateable part of the duty paid by him. This provision has been held applicable although the Estate Duty was not actually paid until after disentail of the lands.<sup>2</sup>

**738.** As regards English land, for the duty on which the personal representative is now bound to account,<sup>3</sup> but with right to recover from the persons beneficially interested, it has been held that the provisions of s. 14 (1) are still fully operative.<sup>4</sup>

SUBSECTION (7).—*Alteration of Statutory Incidence by Testator.*

**739.** No provision made by a testator in his testamentary writings can alter the incidence of Estate Duty in a question with the Crown, as the charge is “paramount to the several limitations of the testator’s will.”<sup>5</sup> In questions between beneficiaries, however, the provisions of s. 14 (1) above are only applicable to dispositions “not containing any express provision to the contrary,” and there has been much litigation on the point whether or not a will contained such an express provision, and on the cognate point whether the instructions of the testator require that, as between parties, the duty on property which normally would bear its own burden in terms of s. 9 (1) should be borne by the residuary estate. The matter may, of course, be beyond doubt, but the following expressions, amongst others, required to be judicially construed as being sufficient: “Without any deduction whatsoever, except in respect of income tax,” said of a jointure in a settlement dated 1861;<sup>6</sup> a direction to pay “my . . . duties” out of residue;<sup>7</sup> the appointment by will under special powers of funds “of the clear amount or value” of so much,<sup>8</sup> and of “the net sum of . . . clear of all costs and expenses of raising the same”;<sup>9</sup> a devise of real property “free of any incumbrances”;<sup>10</sup> while a direction for payment out of a particular fund of the “Estate Duty on everything passing under this my will” was held to cover the duty attributable to “portions” appointed by the will under special powers.<sup>11</sup> Where incumbrances on one Estate are directed to be paid out of another, the case is not

<sup>1</sup> In valuing such interests, Succession Duty, which the heir would have to pay, is ignored; *Pringle v. Pringle*, 1892, 19 R. 926.

<sup>2</sup> *Fowler, Petr.*, 1916 (O.H.), 2 S.L.T. 160.

<sup>3</sup> See para. 723, *supra*.

<sup>4</sup> *Re Morris, Skinner v. Saunders*, [1927] W.N. 146.

<sup>5</sup> *Per Warrington J.* in *In re Earl of Stamford, Payne v. Gray*, [1910] 2 Ch. 83.

<sup>6</sup> *In re Parker-Jervis, Salt v. Locker*, *supra*; and see also *In re Rayer, Rayer v. Rayer*, [1903] 1 Ch. 685.

<sup>7</sup> *In re Pimm, Sharpe v. Hodgson*, [1904] 2 Ch. 345.

<sup>8</sup> *In re Coxwell's Trust, Kinloch Cooke v. Public Tr.*, [1910] 1 Ch. 63.

<sup>9</sup> *In re Grant*, [1915] W.N. 88.

<sup>10</sup> *In re Nesfield, Barber v. Cooper*, [1914] 110 L.T. 970.

<sup>11</sup> *In re Bath's (Marquis) Settlement, Thynne v. Stewart*, [1914] W.N. 188.

within s. 14 (1), and the Estate Duty is payable without reference to such direction.<sup>1</sup>

**740.** The following expressions, on the other hand, have been held not to alter the normal incidence; a direction to pay "the necessary expenses connected with the trust" out of a particular fund did not cover Estate Duty;<sup>2</sup> a direction to pay "all estate and other duties" did not cover the duty on an *inter vivos* gift;<sup>3</sup> a direction to pay the Estate Duty "payable upon or by reason of" the testator's death did not cover Estate Duty on exempted works of art when sold;<sup>4</sup> and a direction in a will to pay "all death duties" did not extend to the duty attributable to a sum covenanted to the trustees of a settlement.<sup>5</sup> In regard to personalty, moreover, a specific bequest of stock "subject to any duty thereon" did not throw the Estate Duty upon it,<sup>6</sup> and power given to a liferentrix of heritable property to raise the duties "which may fall upon her" did not enable her to throw on the heritable property duty payable by her in respect of moveable estate.<sup>7</sup> Where a testator directs that certain legacies are to be "subject to death duties" in contradistinction to others payable "free from duty," this does not affect the incidence of the Estate Duty, but means only that the legacies first mentioned are to bear their own legal incidents, viz. legacy duty.<sup>8</sup>

**741.** The passing of the Finance Act, 1914,<sup>9</sup> gave rise to numerous questions as to whether or not the terms in which relief from duty was conferred by a will included the Estate Duty on subsequent passings of property under the will. It is impossible here to do more than cite one or two of the most recent decisions, applying the rule now adopted by the Courts<sup>10</sup> that it is wrong to differentiate between duties in operation when the testator died and those subsequently imposed, and that the language of each particular will must be regarded. A direction in the will of a testator who died after 1914 to pay "all death duties of every kind on every part of my estate" was held not to be a sufficient indication that the testator intended to take the case out of the general rule that *prima facie* only death duties which become payable on the death of the testator were covered by a clause of exemp-

<sup>1</sup> *In re Earl of Stamford, Payne v. Gray*, [1910] 2 Ch. 83; and cf. *Duke of Hamilton v. Marquis of Graham* (O.H.), Scotsman, 30th June 1916.

<sup>2</sup> *Michie's Exrs. v. Michie*, 1905, 7 F. 509. But cf. *In re Briscoe, Royds v. Briscoe*, [1910] W.N. 251, where a very similar expression was held to include legacy and succession duties. And as to "testamentary expenses" (an expression frequently appearing in English wills), see *In re Clemow, Yeo v. Clemow*, [1900] 2 Ch. 182; *In re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *In re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82; and *In re Pullen, Parker v. Pullen*, [1910] 1 Ch. 564.

<sup>3</sup> *In re Baxter, Baxter v. Baxter*, 1898, 42 Sol. J. 611.

<sup>4</sup> *In re Leconfield (Lord), Wyndham v. Leconfield (Lord)*, 1904, 90 L.T. 399 (C.A.); but cf. *In re Scott, Scott v. Scott*, [1916] 2 Ch. 268 (C.A.).

<sup>5</sup> *In re Briggs, Richardson v. Bantoft*, [1914] 2 Ch. 413.

<sup>6</sup> *In re Brown, Turnbull v. Royal National Lifeboat Institution*, [1916] W.N. 103.

<sup>7</sup> *Fraser v. Croft*, 1898, 25 R. 496.

<sup>8</sup> *In re Morrison, Morrison v. Morrison*, 1910, 102 L.T. 530.

<sup>9</sup> 4 & 5 Geo. V. c. 10. <sup>10</sup> As in *In re Stoddart, Bird v. Grainger*, [1916] 2 Ch. 444.

tion;<sup>1</sup> and a direction that bequests should be “paid free of all duties” was held not to include the Estate Duty payable on the death of the tenant for life of a settled legacy, the duties referred to in the will being taken to be those chargeable at the time of payment or transfer of the legacies whether settled or absolute.<sup>2</sup> A different conclusion was, however, reached in a recent Scottish case,<sup>3</sup> where legacies were “given free of Legacy or other duty,” and the Court took the view that the testator intended that the legatees, including those entitled to the fee of the settled legacy in question, should receive their legacy without deduction of any kind. But in that case the words of exemption might be regarded as emphatic in their application to all legacies irrespective of when they became payable, and there seems room for distinguishing a case where the only exempting words occur in a general direction to pay “debts, funeral, and testamentary expenses, including death duties,” which the English Courts took as insufficient to charge the duties on residue,<sup>4</sup> and a case where the trustees are directed to appropriate and hold in settlement a sum free of duty.<sup>5</sup> The appointment, under a power, of such a sum as might be required to provide for death duties in respect of a specific property does not cover the Estate Duty chargeable on the sum itself.<sup>6</sup>

#### SECTION 9.—CERTIFICATES AUTHORISED BY STATUTE.

##### SUBSECTION (1).—*Certificate of Charge of Duty.*

**742.** On an application submitting in the prescribed form the description of the lands or other subjects of property and of the debts and incumbrances allowed in assessing the value for duty, the Commissioners grant a certificate of the Estate Duty paid (s. 9 (2)). Such a certificate is conclusive evidence that the amount of duty stated is a first charge on the property in question after the debts and incumbrances allowed (s. 9 (3)). This certificate is appropriate only where the duty is a charge on the property in terms of s. 9 (1), and if repayment of the duty or any part thereof becomes necessary, such repayment is to be made to the person producing the certificate (s. 9 (3)).

##### SUBSECTION (2).—*Certificates of Discharge.*

**743.** Where they are satisfied that the full Estate Duty has been or will be paid in respect of an estate or part thereof, the Commissioners,

<sup>1</sup> *In re Beecham, Woolley v. Beecham*, 1923, 130 L.T. 558 (C.A.), followed in *In re Forder, Forder v. Forder*, 1927, 137 L.T. 538.

<sup>2</sup> *In re Wedgwood, Allen v. Public Tr.*, [1921] 1 Ch. 601 (C.A.).

<sup>3</sup> *Dunn's Trs. v. Dunn*, 1924 S.C. 613, approving the principle referred to in *In re Stoddart, Bird v. Grainger*, [1916] 2 Ch. 444, that the language of each particular will must be considered; see also the various cases cited in the pleadings and in the opinions of the Court.

<sup>4</sup> *In re Massey, Ram v. Massey*, 1920, 122 L.T. 676, with which contrast *Re Jones, Lambert v. Colburn*, Law Times, Vol. 166, p. 118 (not yet reported).

<sup>5</sup> *In re D'Ogily, Vertue v. D'Ogily* [1917] 1 Ch. 556.

<sup>6</sup> *In re Constantine, Willan v. Constantine*, 1926, Chancery Division (not reported).



if required by the person accounting for the duty, give a certificate to that effect which discharges from any further claim for Estate Duty the property appearing in the certificate (s. 11 (1)). Certificates under this provision are necessarily limited to property which does not pass to the executor as such.

**744.** On application by an accountable person after the lapse of two years (though earlier application may be entertained, Finance Act, 1907, s. 14),<sup>1</sup> and on delivery and verification of a statement of all property passing on a death, the Commissioners may determine the rate of Estate Duty in respect of the property for which the applicant is accountable, and on payment thereof that property and the applicant are discharged from any claim for Estate Duty, and the Commissioners give a certificate of such discharge (s. 11 (2)). Certificates under this provision are not necessarily limited to property in respect of which Estate Duty is a charge.

**745.** These certificates of discharge do not operate discharge in case of fraud or failure to disclose material facts, nor affect the rate of duty as regards any after-discovered property (s. 11 (3)), but they exonerate a *bona fide* purchaser without notice notwithstanding any such fraud or failure (s. 11 (4)). On commuting duty on an interest in expectancy, the Commissioners grant a certificate of discharge (s. 12), and similarly on accepting a composition of duty (s. 13 (1)). The purchaser of real estate is entitled to evidence that Estate Duty has been paid,<sup>2</sup> but not to a certificate in any particular form.<sup>3</sup>

**746.** As regards land in England, on their being satisfied that an accountable party has paid or commuted, or will pay or commute, all relative death duties, the Commissioners are bound (on request from such party) to give a certificate to that effect, which discharges from any further claim the land to which the certificate extends.<sup>4</sup> Moreover, the production of such certificate to the English land registrar is a sufficient authority to enable the cancellation of any land charge<sup>5</sup> registered in respect of the duty so far as it affects the land in question.

#### SUBSECTION (3).—*Certificates of Value.*

**747.** On application from a person accountable for the duty on any property forming part of an estate, the Commissioners, when it can conveniently be done, certify the amount of the valuation accepted for any class or description of property forming part of such estate (s. 8 (8)).

**748.** No charge is made for any certificate given by the Commissioners under the Act (s. 8 (15)), nor for the various other certificates which the Commissioners are in use to issue to assist accountable persons in regard to the settlement of duties and adjustment of allowances in various colonies and foreign countries.

<sup>1</sup> 7 Edw. VII. c. 13.

<sup>2</sup> *In re Conlan and Faulkener's Contract*, [1916] 1 I.R. 241.

<sup>3</sup> *Howe (Earl) v. Lichfield (Earl)*, 1867, L.R. 2 Ch. 155, a case on Succession Duty.

<sup>4</sup> Law of Property Act, 1925 (15 Geo. V. c. 20), s. 16 (7).

<sup>5</sup> See para. 725, *supra*.

## SECTION 10.—APPEALS FROM COMMISSIONERS.

SUBSECTION (1).—*Appeals to the Court.*

**749.** Any person aggrieved by the decision of the Commissioners with respect to the repayment of any excess of duty paid, or by the amount of duty claimed by the Commissioners, whether on the ground of the value of any property (other than heritable property),<sup>1</sup> or the rate charged or otherwise, may, on payment of or giving security as hereinafter mentioned for the duty claimed, appeal in Scotland to the Court of Session (in England to the High Court) on conditions laid down by Rules of Court, and the amount of duty is then determined by the Court and any excess repaid (s. 10 (1)). No appeal from such decision is allowed except by leave of the Court (s. 10 (2)), and costs are in the discretion of the Court, who may also order the Commissioners to pay interest on any excess of duty paid, where this appears to the Court just (s. 10 (3)). Where, however, the value as alleged by the Commissioners does not exceed £10,000, the appeal, in Scotland, may be to the Sheriff Court (in England to the County Court) of the county in which the applicant resides or the property is situate (s. 10 (5)), with right of appeal.<sup>2</sup> If the Court is satisfied that it would impose hardship to require the appellant to pay the whole duty as a condition of the appeal, it may allow the appeal to be brought without payment, or on payment of such part of the duty as the Court thinks reasonable, and on security being given to the satisfaction of the Court for the unpaid duty; but in such case the Court may order payment of interest on the duty payable under its decision (s. 10 (4)).

**750.** Rules of Court have been made under the section, and, so far as concerns Scotland, appear in Book C, Chapter VIII, of the Codified Act of Sederunt.<sup>3</sup> In the only case which has so far occurred of an appeal being allowed without payment, the Court ordered the appellant to give security in the shape of a guarantee bond by an insurance company.<sup>4</sup>

SUBSECTION (2).—*Appeals to a Referee.*

**751.** Where the question in dispute is the value of heritable property, an appeal in terms of the preceding subsection does not lie,<sup>5</sup> but any person aggrieved by the decision of the Commissioners may appeal against such decision in the manner prescribed by the Finance (1909–10) Act, 1910,<sup>6</sup> such appeal being referred to one of a panel of referees appointed under the Act, and the decision of such referee, subject to the appeal to the Court mentioned below,<sup>7</sup> is final. The referee is to

<sup>1</sup> See para. 751, *infra*.

<sup>2</sup> Finance Act, 1896 (59 & 60 Vict. c. 28) s. 22.

<sup>3</sup> S.R. & O., 1913, No. 638 (S. 44).

<sup>4</sup> In *M'Connel's Trs. v. Inland Revenue Commrs.*, 1927 (O.H.), S.L.T. 14 (not reported on this point).

<sup>5</sup> Irrespective of the date of death, per Sheriff-Substitute Young in a case of *Man Stuart* in the Sheriff Court, Aberdeen, on 7th December 1910 (not reported).

<sup>6</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>7</sup> Para. 753, *infra*.

determine any matter referred to him in consultation with the Commissioners and the appellant or persons nominated by them, and may, if he thinks fit, award expenses against either party (Finance (1909-10) Act, 1910, ss. 60 (3) and 33 (1), (2), and (3)).<sup>1</sup>

**752.** The above Act provides also (s. 33 (5)) for the making of rules of appeal by the Reference Committee, subject to the approval of the Treasury, and the Reference Committee for Scotland is to consist of the Lord President of the Court of Session, the Lord Justice-Clerk, and the Chairman of the Scottish Committee of the Surveyors' Institution. Rules were duly made under the name of The Land Values (Referee) (Scotland) Rules, 1911, dated 24th April 1911, with an additional rule, dated 31st July 1913.<sup>2</sup>

**753.** Provision is also made by the same Act (s. 33 (4)) for appeal by either party (see s. 7 of the Revenue Act, 1911)<sup>3</sup> against the decision of the referee to the Court of Session (or where the value alleged by the Commissioners does not exceed £500, to the Sheriff Court, with right to appeal), on the conditions directed by Rules of Court (including conditions enabling the Court to require the payment of duty or the giving of security); and the provisions of s. 10 (2), (3), and (4) of the principal Act<sup>4</sup> apply with reference to such appeal. Rules of Court for Scotland appear in Book J, Chapter II, of the Codified Act of Sederunt.<sup>5</sup>

## SECTION 11.—PAYMENT AND RECOVERY OF DUTY AND PENALTIES.

### SUBSECTION (1).—*Forms of Account, etc.*

**754.** Estate Duty is a stamp duty (s. 6 (1)) and may be collected by means of stamps or such other means as the Commissioners prescribe. All affidavits, accounts, statements, and forms are to be in such form and to contain such particulars as the Commissioners prescribe, and if so required are to be in duplicate; and accounts and statements are to be verified on oath and by production of books and documents (s. 8 (14)). A corrective statement may, however, be accepted without oath (s. 13 (2) of the Finance Act, 1900).<sup>6</sup> As to the persons before whom oaths and affirmations to inventories and revenue statements may be taken, see Executors (Scotland) Act, 1900, s. 8.<sup>7</sup> Forms of inventories and accounts in use in Scotland may be obtained from the Estate Duty Office, Edinburgh, and at authorised stamp and post offices in the country; particulars as to those to be used in England may be obtained from the Controller, Estate Duty Office, Somerset House, London, W.C. 2. A list of the forms most commonly in use in Scotland will be found in the official Form N issued by the Estate Duty Office, and in the Parliament House Book, *sub voce* "Death Duties."

<sup>1</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>2</sup> S.R. & O., 1911, No. 433 (S. 44), as amended. These rules are printed in "British Death Duty Acts, 1796 to 1924," referred to at para. 627, *supra*.

<sup>3</sup> 1 & 2 Geo. V. c. 2.

<sup>4</sup> See para. 749, *supra*.

<sup>5</sup> S.R. & O., 1913, No. 638 (S. 44).

<sup>6</sup> 63 & 64 Vict. c. 7.

<sup>7</sup> 63 & 64 Vict. c. 55.



SUBSECTION (2).—*When Duty Payable.*

**755.** The Estate Duty to be collected on an inventory or account is due on the delivery thereof,<sup>1</sup> or on the expiration of six months from the deceased's death, whichever first happens (s. 6 (7)). Where the Commissioners are satisfied that the duty cannot without excessive sacrifice be raised at once, they may allow payment to be postponed on such terms as they think fit (s. 8 (9)). The duty payable in respect of heritable property may at the option of the person accounting be paid, with interest from the time when the first instalment is due, by eight yearly or sixteen half-yearly instalments, the first of which is due a year after the death. Interest on the unpaid duty is added to each instalment, but duty and interest may be paid up at any time and become payable immediately if the property be sold (s. 6 (8)). The Estate Duty payable in respect of an annuity or other interest (see s. 2 (1) (d)) may be paid by four yearly instalments, the first being due a year after the death, interest after the end of such year being added to each instalment (Finance Act, 1896, s. 16).<sup>2</sup> There is no provision for the allowance of discount for prepaid Estate Duty.

SUBSECTION (3).—*Limitation of Liability.*

**756.** No person is liable for Estate Duty under a Confirmation after six years from the date of settlement of an account, including an inventory, where such was full and true and disclosed all material facts, but an account is not "settled" until the time for payment of duty has arrived; and no trustee or executor is liable after six years, provided that the account rendered was correct to the best of his knowledge and belief (s. 8 (2), incorporating ss. 12 to 14 of the Customs and Inland Revenue Act, 1889).<sup>3</sup> These sections also provide, as regards liability under documents not admitted to probate, that if an attested copy be deposited with the Commissioners, and notice be given in prescribed form of the facts which give rise to a claim for duty, no person shall be liable for duty under the document submitted after the expiration of six years from the date of notice.

**757.** As regards *bona fide* purchasers<sup>4</sup> for valuable consideration, nothing in s. 8 (which deals with accountability) is to render such purchasers, if without notice, liable to or accountable for duty. Further, heritable property does not, as against such a purchaser or a mortgagee, remain charged with or liable to duty after six years from the date of notice to the Commissioners that the beneficiary, or someone in his right, has become entitled in possession or from the date of the first payment of duty by him; and in the absence of such notice or payment,

<sup>1</sup> As to the option given in regard to duty on interests in expectancy, see para. 697, *supra*.

<sup>2</sup> 59 & 60 Vict. c. 28.

<sup>3</sup> 52 & 53 Vict. c. 7.

<sup>4</sup> As to protection of purchasers and mortgagees in regard to interests in expectancy, see para. 687, *supra*; and as to purchasers of land in England, see para. 725, *supra*.

after twelve years from the happening of the event which gave rise to the claim for duty (s. 8 (2), embodying s. 12 (1) of the Customs and Inland Revenue Act, 1889).<sup>1</sup> The liability of any person other than the purchaser or mortgagee is not lessened or affected (s. 12 (2) and (3) of last-mentioned Act).

#### SUBSECTION (4).—*Penalties.*

**758.** The provision of penalties is for wilful, not inadvertent, default, and applies to the following cases:—

- (a) The wilful omission of an executor to specify in the inventory all property on which duty is payable (s. 8 (3));
- (b) The wilful omission of a person to deliver an account timeously (s. 8 (4));
- (c) The wilful failure to comply with a request to submit and verify particulars of property passing (s. 8 (5) and (14)).

In these cases a penalty is imposed by s. 8 (6) of £100 or double the unpaid duty, as the Commissioners determine, but they have power to reduce the amount, as also has the Court. A more stringent penalty is imposed by s. 94 of the Finance (1909–10) Act, 1910,<sup>2</sup> as regards any false statement or representation made for the purpose of obtaining any relief, etc., in respect of duty under that Act. A penalty is also imposed by s. 38 of the Probate and Legacy Duties Act, 1808<sup>3</sup> of £20 and double duty upon any person refusing or neglecting to exhibit an inventory in terms of that section or knowingly omitting any part of the estate therefrom, and the penalty of double duty is repeated as regards neglect to exhibit an inventory, and is extended to cover the case of neglect to deliver an account, by s. 40 of the Customs and Inland Revenue Act, 1881.<sup>4</sup> These provisions apply in regard to Estate Duty by force of s. 8 (1) of the principal Act.

#### SECTION 12.—COMMUTATION OF DUTY.

**759.** The Commissioners may, on application by a person entitled to an interest in expectancy, commute for a present payment the Estate Duty presumptively payable thereon, by setting a present value on such duty, regard being had to the contingencies affecting the liability, rate, and amount thereof. On payment of the sum assessed a certificate of discharge is granted (s. 12).

**760.** Under this provision, application is accepted from trustees holding settled property on which Estate Duty is presumptively payable, say, on the death of a liferenter, but only if the circumstances render this necessary or advisable, *e.g.* where the property, or part of it, is being taken out of settlement. Commutation is not generally necessary in case of a sale by trustees under powers, as the presumptive claim

<sup>1</sup> 52 & 53 Vict. c. 7.

<sup>3</sup> 48 Geo. III. c. 149.

<sup>2</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>4</sup> 44 & 45 Vict. c. 12.

will attach to the proceeds in the hands of the trustees, but if a life-renter and fiar sell their interests in settled property, or if a liferenter, to enable a fiar to sell, surrenders his interest to him under reservation of an annuity, the duty which will become payable on the death of the liferenter should be commuted; and a purchaser of property so situated, on which the duty remains a charge in a question with the Crown, is clearly concerned to have this done. Where the option to defer payment of Estate Duty on a vested expectancy has been exercised in terms of s. 7 (6), and it is afterwards desired, before the expectancy has fallen into possession, to pay the duty thereon, this can only be done by way of commutation.

**761.** When commutation has been agreed to by the Estate Duty Office, a form of account is supplied, and duty is assessed on the basis of the amount due if the property were in possession, discounted on a 4 per cent. basis according to the age of the liferenter. The account requires it to be stated that such liferenter is in ordinary good health, and contains a form of certificate of discharge which, if desired, is completed on payment of the duty assessed.

**762.** Property on which Estate Duty has been commuted is not aggregated with other property which passes on the death when that event actually occurs.<sup>1</sup>

#### SECTION 13.—REPAYMENT OF DUTY.

**763.** No right to repayment appears to arise under common law,<sup>2</sup> but statutory provisions on the subject are as follows:—

- (a) The existing law and practice in regard to repayment of the former death duties apply to Estate Duty, so far as appropriate (s. 8 (1)). In this connection, s. 37 of the Legacy Duty Act, 1796;<sup>3</sup> s. 37 of the Succession Duty Act, 1853;<sup>4</sup> and s. 31 of the Customs and Inland Revenue Act, 1881,<sup>5</sup> may be referred to, but it seems that the provisions of these earlier Acts are incorporated only so far as regards procedure.<sup>6</sup>
- (b) Where it is proved to the satisfaction of the Commissioners of Inland Revenue that too much Estate Duty has been paid, the excess is to be repaid by them—with interest if the over-payment was due to over-valuation by the Commissioners (s. 8 (12)).
- (c) Inferentially, under s. 9 (3), repayment may be made on the ground of want of title or the existence of a debt or incumbrance not allowed for, and such repayment is to be made to the person producing the certificate of charge (s. 9 (3)).

<sup>1</sup> *Attorney-General v. Howe*, 1925, 133 L.T. 801 (C.A.).

<sup>2</sup> See Lord Moncreiff in *Alston's Trs. v. Lord Advocate*, 1895, 33 S.L.R. at p. 281.

<sup>3</sup> 36 Geo. III. c. 52; and see para. 793, *infra*.

<sup>4</sup> 16 & 17 Vict. c. 51; and see para. 844, *infra*.

<sup>5</sup> 44 & 45 Vict. c. 12.

<sup>6</sup> See *Watherston's Trs. v. Lord Advocate*, 1901, 3 F. 429.



- (d) Where, on appeal, the amount of duty determined by the Court is less than that paid to the Commissioners, the excess is to be repaid (s. 10 (1)) with interest if the Court so order<sup>1</sup> (s. 10 (3)).

### PART III.—LEGACY DUTY.

#### SECTION 1.—PROPERTY LIABLE.

##### SUBSECTION (1).—*General.*

**764.** The British Legacy Duty, as already shortly explained,<sup>2</sup> is in the nature of an acquisition duty in respect of property acquired by a beneficiary, its rate depending on his relationship to the person from whom the benefit is derived. The principal Act governing its levy is the Legacy Duty Act, 1796.<sup>3</sup> Where, therefore, in what follows in Part III. hereof, any section is referred to without further specification, it is to a section of that Act that reference is made. The rates are graded from 1 to 10 per cent., and while the first-mentioned rate (appropriate to the succession of lineal issue and ancestors) was for a time covered by the payment of Estate Duty under the Finance Act, 1894,<sup>4</sup> it was reimposed (and also made applicable to a legacy to a wife or a husband) as regards the larger estates by the Finance (1909–10) Act, 1910,<sup>5</sup> which also increased the intermediate rates.

##### SUBSECTION (2).—*Scope of the Levy.*

**765.** Apart from the special case of donations *mortis causa*,<sup>6</sup> Legacy Duty is a levy only on personal estate forming the subject of bequest, or devolving under intestacy, and the test of liability is the British domicile of the deceased testator or intestate at the time of his death. Estate in this country therefore escapes the charge if the deceased owner has died domiciled abroad,<sup>7</sup> but if he has died domiciled in Great Britain, the duty is payable on his personal estate, whatever its actual *situs*, including, in addition to pure personalty and accumulations thereof,<sup>8</sup> (a) real or heritable property (including foreign property) in which the deceased's interest was a personal one, *e.g.* where it was partnership property,<sup>9</sup> (b) debts secured on realty, (c) estates *pur autre vie* (s. 20), (d) monies directed to be applied in the purchase of heritable property until so applied (s. 19). Leaseholds are not now included (Succession Duty Act, 1853, s. 19),<sup>10</sup> and since 1888 legacies

<sup>1</sup> See *Sprot's Trs. v. Lord Advocate*, 1902 (O.H.), 10 S.L.T. 452.

<sup>2</sup> See paras. 612 and 620, *supra*.

<sup>3</sup> 36 Geo. III. c. 52.

<sup>4</sup> 57 & 58 Vict. c. 30.

<sup>5</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>6</sup> See para. 773, *infra*.

<sup>7</sup> *Thomson v. Advocate-General*, 1845, 12 Cl. & F. 1; and see *Lord Advocate v. Brown's Trs.*, 1907 S.C. 333.

<sup>8</sup> *Advocate-General v. Oswald*, 1848, 10 D. 969.

<sup>9</sup> *Forbes v. Steven*, 1870, L.R. 10 Eq. 178; *In re Stokes, Stokes v. Ducroz*, 1890, 62 L.T. 176.

<sup>10</sup> 16 & 17 Vict. c. 51.

charged on real or heritable property, or the proceeds of such property directed by the testator's will to be sold, are chargeable with Succession Duty under the Customs and Inland Revenue Act, 1888 (s. 21 (2)).<sup>1</sup> Instances of a charge of Legacy Duty on such proceeds are now of infrequent occurrence, but a note is subjoined of cases which concerned that charge.<sup>2</sup>

### SUBSECTION (3).—*Definition of Legacy.*

**766.** The statutory definition is given in s. 4 of the Revenue Act, 1845,<sup>3</sup> and is that every gift, whether by way of annuity or in any other form, which by virtue of the will or testamentary instrument<sup>4</sup> of any person is payable out of his personal or moveable estate or out of personal or moveable estate which he had power to dispose of, shall be deemed a legacy within the meaning of the charging provisions. The definition included also gifts by will payable out of, or charged on, real or heritable estate or the proceeds thereof; but whilst such gifts still remain legacies, Succession Duty is now payable in lieu of Legacy Duty.

**767.** There are thus three essential conditions to a legacy. First, there must be a gift, though it is not material that such gift was made in respect of an obligation,<sup>5</sup> unless this was an obligation to bequeath a specified sum,<sup>6</sup> or involved a return to the personal estate of the testator,<sup>7</sup> nor that it imposed some condition or stipulated for some service,<sup>8</sup> including that of acting as executor.<sup>9</sup> Secondly, the benefit must be derived under a will or testamentary instrument, *i.e.* "a writing whatever the form . . . if it remains dormant during the life of the person executing it, if it be revocable until his death, and if it only comes into active power at his death,"<sup>10</sup> and so an antenuptial marriage contract is excluded<sup>11</sup> so far as concerns objects within the marriage consideration,<sup>12</sup> but not a revocable bond of annuity.<sup>13</sup> And, thirdly, the benefit must be payable out of personal property belonging to the

<sup>1</sup> 51 & 52 Vict. c. 8.

<sup>2</sup> *Advocate-General v. Ramsay's Trs.*, 1823, 2 Cr. M. & R. 224; *Advocate-General v. Anstruther*, 1842, 13 D. 450; *Williamson v. Advocate-General*, 1843, 2 Bell's App. 89; *Advocate-General v. Smith*, 1854, 1 Macq. 760; *Advocate-General v. Hamilton*, 1856, 18 D. 636; *Lord Advocate v. Hill*, 1862, 24 D. 808; *Weir v. Lord Advocate*, 1865, 3 M. 1006.

<sup>3</sup> 8 & 9 Vict. c. 76.

<sup>4</sup> As to the speciality of nuncupative legacy, see *Turner's Trs. v. M'Fadyen*, 1906, 43 S.L.R. 712; (O.H.) 14 S.L.T. 57.

<sup>5</sup> See *Jervis v. Wolverstan*, 1874, L.R. 18 Eq. 18.

<sup>6</sup> Per Lord Ardmillan in *Lord Advocate v. Robert's Trs.*, 1857, 20 D. at p. 452.

<sup>7</sup> Per Kindersley V.C. in *Sweeting v. Sweeting*, 1853, 1 Drew. at p. 335.

<sup>8</sup> *Lord Advocate v. Reid's Trs.*, 1880, 7 R. 483; *In re Thorley, Thorley v. Massam*, [1891] 2 Ch. 613; *Attorney-General v. Sharpe*, 1891, 7 T.L.R. 558 (C.A.); *Lord Advocate v. Dick's Trs.*, 1907 S.C. 880; but cf. *In re Harris*, 1852, 7 Exch. 344.

<sup>9</sup> See *Duncan v. Watts*, 1852, 16 Beav. 204.

<sup>10</sup> Per Lord Chief Baron in *Advocate-General v. Ramsay's Trs.*, 1823, 2 Cr. M. & R. at p. 229.

<sup>11</sup> *Advocate-General v. Trotter*, 1847, 10 D. 56.

<sup>12</sup> See Lord Adam in *Barclay's Trs. v. Watson*, 1903, 5 F. at p. 930.

<sup>13</sup> *Lord Advocate v. Reid's Trs.*, *supra*.

testator or subject to a power of disposal which he was in a position to exercise.<sup>1</sup> The release by will of a debt is a legacy,<sup>2</sup> as is also a direction to pay the debts of another person,<sup>3</sup> or an extinguished debt,<sup>4</sup> but not one which is merely statute barred;<sup>5</sup> while a legacy (not void from uncertainty) is not the less liable because the selection of the legatee,<sup>6</sup> or the amount of the legacy,<sup>7</sup> is in the discretion of the trustees.<sup>8</sup> The "clear residue," or any share thereof, of the personal or moveable estate (after deducting debts, funeral expenses, legacies and other charges first payable thereout), whether the title accrued by virtue of any testamentary disposition or upon a partial or total intestacy, is specifically brought into charge.<sup>9</sup>

768. A direction to pay duties which otherwise would be charged against a legacy or bequest is itself a legacy,<sup>10</sup> and an annuity bequeathed free of income tax or super-tax comprises a legacy of the amount of the tax in addition to that of the bare annuity. Exemption arises under s. 21 as regards monies so directed to be applied in payment of Legacy Duty, but not in the case of any other duty. It has been held that a memorandum creating a trust binding on a residuary legatee should be treated as if it formed part of the testamentary writings.<sup>11</sup>

#### SUBSECTION (4).—*Duty-free Bequests.*

769. A direction to pay Legacy Duty out of some other fund, so as to enable a legacy to be paid free of duty, is, as above stated, specially exempted from duty (s. 21). Where, however, all the legacies are given free of duty and there is a shortage, so that there is no "other fund" out of which the duty can be provided, duty is payable on the whole sums taken, including the portion to be applied in duty;<sup>12</sup> and where, in such a case, some of the legacies are bequeathed duty-free and some are not, the duty is to be paid and deducted before dividing the fund.<sup>13</sup> A residue cannot be bequeathed free of duty,<sup>14</sup> but one share of,<sup>15</sup> or an

<sup>1</sup> *Lord Advocate v. Bogie*, [1894] A.C. 83.

<sup>2</sup> *Attorney-General v. Holbrook*, 1823, 3 Y. & J. 114, and see also *Attorney-General v. Hollingworth*, 1857, 2 H. & N. 416.

<sup>3</sup> *Foster v. Ley*, 1835, 2 Bing. N.C. 269.

<sup>4</sup> *Turner v. Martin*, 1857, 7 De G. M. & G. 429.

<sup>5</sup> *Williamson v. Naylor*, 1838, 3 Y. & C. Ex. 208.

<sup>6</sup> *Lord Advocate v. Nisbet's Trs.*, 1878 (O.H.), 15 S.L.R., 508; see, however, *Sutherland's Trs. v. Chalmers*, 1893, 20 R. 925.

<sup>7</sup> *Attorney-General v. Wade*, [1910] 1 K.B. 703.

<sup>8</sup> As to property subject to disposal see "Appointable Property," para. 784 *infra*.

<sup>9</sup> By Stamp Act, 1815 (55 Geo. III. c. 184), Schedule, Part III, as amended by s. 42 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12).

<sup>10</sup> See *Parker J. in In re Hadley*, [1909] 1 Ch. at p. 25; and *Farrer v. St. Catharine's College*, 1873, L.R. 16 Eq. 19.

<sup>11</sup> *In re Maddock, Llewelyn v. Washington*, [1902] 2 Ch. 220 (C.A.).

<sup>12</sup> *Lord Advocate v. Miller's Trs.*, 1884, 11 R. 1046; *In re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726.

<sup>13</sup> *In re Wilkins, Wilkins v. Rotherham*, 1884, 27 Ch. D. 703.

<sup>14</sup> *Londesborough (Lord) v. Somerville*, 1854, 19 Beav. 295.

<sup>15</sup> *Warbrick v. Varley* (No. 1), 1861, 30 Beav. 241.



interest in,<sup>1</sup> residue may be exonerated at the expense of the rest, provided this is the testator's unequivocally expressed intention.<sup>2</sup> The provisions of s. 21 relate to Legacy Duty only, and no exemption arises where the payment directed to be made is of any other duty.<sup>3</sup>

#### SUBSECTION (5).—*Compromised Legacies.*

770. Where a legacy or a residue is compounded for less than its value, duty is payable on the amount of the composition (s. 23), and where a person claiming his legal rights accepts less than their full value, the balance of the estate is liable as passing to the legatee.<sup>4</sup> Accordingly, if a challenged will is allowed to stand, the terms of a *bona fide* compromise are adopted as the basis of the levy of duty,<sup>5</sup> but s. 23 has no application where the next-of-kin reduce the will, duty being in that case payable according to their relationship to the testator, notwithstanding that they have agreed to compromise the claims of those founding on the will,<sup>6</sup> nor does it apply where heritable property and Succession Duty thereon are in question.<sup>7</sup> The grounds on which the Court proceeds cannot be enquired into,<sup>8</sup> unless there is reason to suppose that the compromise agreement between the parties was not *bona fide*, but was entered into for the purpose of evading duties.<sup>9</sup> If a legacy be made in satisfaction of any other legacy or title to any residue remaining unpaid, duty is not payable on both subjects, though both may be chargeable, but is paid on the subject yielding the largest duty (s. 23).

771. Where a legatee disclaims, he cannot be held liable to duty, but the disclaimer must be *ab initio*,<sup>10</sup> and not a device to enable him to take under another title.<sup>11</sup>

<sup>1</sup> *In re Kennedy, Corbould v. Kennedy*, [1917] 1 Ch. 9 (C.A.).

<sup>2</sup> *Macdonald's Trs. v. Corporation of Aberdeen*, 1902, 4 F. 907.

<sup>3</sup> As to what words of direction amount to a direction to pay a legacy duty free, see the following cases: *Beaton v. Bullock*, 1853, 15 D. 373; *Bedford v. Kirkpatrick*, 1878, 4 App. Cas. 96; *Urquhart's Trs. v. Urquhart*, 1900, 3 F. 242; *Macdonald's Trs. v. Aberdeen Corpn.*, 1902, 4 F. 907; *Brown's Trs. v. Gow*, 1902, 5 F. 127; and see also *In re Howe, Wilkinson v. Ferniehough*, [1910] W.N. 190; and *In re Massey, Ram v. Massey*, 1920, 122 L.T. 676. Compare also cases cited in paras. 739 to 741, *supra*. The testator's intention that the Legacy Duty should be paid by the executor may be "collected from any direction contained in the will," per Alderson B. in *Gude v. Mumford*, 1837, 2 Y. & C. Ex. at p. 456.

<sup>4</sup> *Lord Advocate v. Miller's Trs.*, 1884, 11 R. 1046.

<sup>5</sup> *Lord Advocate v. Murray*, 1894, 21 R. 743; and see *Lord Advocate v. Watherston's Trs.*, 1901, 3 F. 627.

<sup>6</sup> *Reg. v. Commrs. of Stamps and Taxes (Stracey's case)*, 1844, 6 Q.B. 657.

<sup>7</sup> *Lord Advocate v. Gordon*, 1895, 22 R. 639; *Lord Advocate v. Christie's Trs.*, 1905 (O.H.), 12 S.L.T. 690.

<sup>8</sup> Per Lord Welwood in *Lord Advocate v. Murray*, *supra*, at p. 745.

<sup>9</sup> Per Lord Adam in same case at p. 747.

<sup>10</sup> *Attorney-General v. Munby*, 1856, 3 H. & N. 826; and see Lord Adam in *Lord Advocate v. Duke of Hamilton*, 1891, 29 S.L.R. at p. 222.

<sup>11</sup> *Attorney-General v. Brackenbury*, 1863, 1 H. & C. 782.

SUBSECTION (6).—*Moneys to be applied in the Purchase of Real or Heritable Estate.*

772. Such moneys are liable to Legacy Duty as personal estate so long as they have not actually been so applied, and if, before such actual application, any person becomes entitled to “an estate of inheritance in possession in the real estate to be purchased therewith,” he is to pay Legacy Duty as if absolutely entitled to personalty (s. 19). The effect of this provision was considered by the English Courts in, and applied to, a case where a life-tenant of the moneys acquired *aliunde* an absolute right;<sup>1</sup> and by the Scottish Courts and the House of Lords in a case<sup>2</sup> where an heir of entail had acquired an absolute right by disentail procedure. It was there held that the interest of an heir of entail was an “inheritance in possession” in the sense of the section, apart altogether from the disentail proceedings, and that duty was payable without any allowance for the compensation he had paid therein to the next heir.

SUBSECTION (7).—*Donations mortis causa.*

773. Every gift which has effect as a donation *mortis causa* is deemed a legacy.<sup>3</sup> The legal position of such donations was fully explained in the cases noted below.<sup>4</sup>

SECTION 2.—RATES OF DUTY.

SUBSECTION (1).—*Deaths before 30th April 1909.*

774. Where the testator or intestate died before 30th April 1909, the rates are those fixed by s. 2 of the Stamp Act, 1815,<sup>5</sup> and Schedule, and are: lineal descendants or ancestors, 1 per cent., except where Estate Duty<sup>6</sup> or Inventory or Account Duty<sup>7</sup> has been paid; brothers and sisters and their descendants, 3 per cent.; brothers and sisters of the father or mother and their descendants, 5 per cent.; brothers and sisters of the grandfather or grandmother and their descendants, 6 per cent.; all other relatives and strangers in blood, 10 per cent. Illegitimates are liable at the full rate, as also a divorced husband or wife *quoad* legacies from each other, unless there be blood relationship. Relatives merely of the husband or wife of the testator or intestate

<sup>1</sup> *Kentis v. Hodgson*, [1895] 2 Ch. 458; and see also *In re de Lancy*, 1870, L.R. 5 Exch. 102.

<sup>2</sup> *Macfarlane v. Lord Advocate*, [1894] A.C. 291; *Lord Advocate v. Dunlop's Trs.*, in the Scottish Courts, 1891, 19 R. 461 and 21 R. 348.

<sup>3</sup> Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4.

<sup>4</sup> *Martin's Trs. v. Martin*, 1887 (O.H.), 24 S.L.R. 484; *Blyth v. Curle*, 1885, 12 R. 674; and see also *Lord Advocate v. Grierson*, 1877 (O.H.), 15 S.L.R. 105; and *Lord Advocate v. Galloway*, 1884, 11 R. 541.

<sup>5</sup> 55 Geo. III. c. 184.

<sup>6</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1.

<sup>7</sup> Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 41. But the Inventory Duty paid must have been at the rates introduced by that Act.

pay as strangers in blood, but where a legatee, before his legacy has become chargeable, "shall have been married to" a spouse more nearly related to the testator than he himself is, he pays duty at the lower rate appropriate to that spouse (s. 11 of the Succession Duty Act, 1853),<sup>1</sup> and the phrasing of the section referred to would seem to involve that divorce would not deprive the legatee of this benefit.

SUBSECTION (2).—*Deaths on or after 30th April 1909.*

**775.** In this case the rates are those fixed by s. 58 of the Finance (1909–10) Act, 1910,<sup>2</sup> and are: husband or wife and lineal issue or ancestors (and the husband or wife of such), 1 per cent., whether Estate Duty is payable or not; brothers or sisters and their descendants (and the husband or wife of such), 5 per cent.; all other relatives and strangers in blood (including therein illegitimates<sup>3</sup> and a divorced husband or wife of the testator), 10 per cent. The death on or after 30th April 1909 is that of the testator by whose will the legacy is given or the intestate on whose death the Legacy Duty is payable (subsec. (4) of above s. 58), and accordingly if Legacy Duty be payable on the death of a liferenter under the will of a person dying before 30th April 1909, only the rates in force prior to that date are payable. The 1 per cent. duty is, moreover, subject to exceptions: (i) where the value of the property on which Estate Duty is payable passing on the death of the testator or intestate (other than property in which the deceased never had an interest, or of which he never was competent to dispose, and which on his death passes to persons other than husband or wife or direct lineal) does not exceed £15,000; and (ii) where the total benefit derived by the legatee from the testator, intestate, or predecessor does not exceed £1000, or in the case of a widow or minor child £2000 (see proviso to s. 58 (2) of the Act of 1910, as construed by s. 58 (3)).

SUBSECTION (3).—*Margin Cases.*

**776.** Where the net value of the estate for the purpose of Estate Duty, exclusive of property settled otherwise than by the will, exceeds £1000, the amount of Legacy and Succession Duty is not to exceed the amount of the excess over £1000 (s. 13 (2) of the Finance Act, 1914).<sup>4</sup>

<sup>1</sup> 16 & 17 Vict. c. 51.

<sup>2</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>3</sup> But a person legitimated by the Legitimacy Act, 1926 (16 & 17 Geo. V. c. 60), or any relative of such person, is to pay duty only at the rate payable if he had been born legitimate (s. 7 of that Act), and similarly as regards a child born prior to his parents' marriage, but afterwards legitimated according to the law of the domicile, *Skottowe v. Young*, 1871, L.R. 11 Eq. 474; *In re Grey's Trusts*, *Grey v. Stamford*, [1892] 3 Ch. 88; and see also s. 8 of the Legitimacy Act, 1926. As to children adopted in terms of the Adoption of Children Act, 1926 (16 & 17 Geo. V. c. 29), see s. 5 (3) of that Act, which has, however, no application to Scotland (s. 12 (3)). As regards the special rights of inheritance between an illegitimate child and the mother of such child provided in s. 9 (1) and (2) of the Legitimacy Act, 1926, which is applied to Scotland by s. 9 (4), no provision is made for relief as regards death duties, which will accordingly be payable at the full rate,

<sup>4</sup> 4 & 5 Geo. V. c. 10.



Thus, in the case of an estate of £1050 falling to strangers in blood, the normal levy of 10 per cent. on, say, £950 (£1050 less Estate Duty and expenses) or £95 is reduced to £50, the amount of the excess over £1000. This benefit should presumably be apportioned rateably among all the beneficiaries liable to duty, though the statute is silent on this point.

### SECTION 3.—VALUE FOR DUTY.

#### SUBSECTION (1).—*Time of Computing.*

777. While the Crown's right to duty arises on the death, payment is due only upon retainer of the legacy for the legatees or upon delivery, payment, or other satisfaction thereof (s. 6). The earlier accrual of the right to duty entitles the Crown, however, to payment not only on the legacy itself, but also on all interest or accretions up to the time of retainer or satisfaction,<sup>1</sup> and accordingly the value to be accounted for is the value at that time with the addition of such accretions, including accumulation directed by the testator.<sup>2</sup> If a legacy is payable, and is paid, at a fixed date without interest, only the bare duty is exigible, any interest earned falling to be accounted for as part of the residue, but any delay in accounting involves a charge of interest on the duty from the due date till actual payment of the duty.

#### SUBSECTION (2).—*Retainer for Beneficiary.*

778. Ascertainment of the date of satisfaction by payment or delivery usually presents no difficulty,<sup>3</sup> but the date of "retainer" is sometimes less obvious. Mere appropriation may not be sufficient if the fund is still under the executor's control,<sup>4</sup> and while any circumstance signifying the termination of the executorial function, *e.g.* payment into Court<sup>5</sup> or the lodging of the residuary account,<sup>6</sup> is material, the question is really one of fact.<sup>7</sup> It would seem that retainer cannot take place at the earliest until an executor has completed his title, but the "executor's year," which is a feature in English, has no place in Scottish, practice. Partial payments and distributions may be made from time to time on payment of the appropriate proportion of the duty (s. 26). Where the claim arises on the death of a liferenter, and the estate has previously been realised, retainer for the *fiar* may be considered to take place immediately on the death.

<sup>1</sup> *Attorney-General v. Cavendish*, 1810, Wight. 82; *Thomas v. Montgomery*, 1827, 3 Russ. 502; *Advocate-General v. Oswald*, 1848, 10 D. 969; *Nisbett's Trs. v. Learmonth*, 1845, 8 D. 69; *Lord Advocate v. Nisbet's Trs.*, 1878 (O.H.), 15 S.L.R. 508.

<sup>2</sup> *Advocate-General v. Oswald*, *supra*.

<sup>3</sup> But see *Attorney-General v. Metcalf*, 1851, 6 Exch. 26.

<sup>4</sup> *Attorney-General v. Hancock*, 1837, 2 M. & W. 563.

<sup>5</sup> *Coombe v. Trist*, 1835, 1 My. & Cr. 69.

<sup>6</sup> *Attenborough v. Solomon*, [1913] A.C. 76.

<sup>7</sup> *In re Claremont*, [1923] 2 K.B. 718; and see, as to the right of residuary legatees, *Dr. Barnardo's Homes v. Special Commrs.*, [1921] 2 A.C. 1.

SUBSECTION (3).—*Valuation of Assets.*

**779.** Where property has been “reduced into money” (s. 22) “during the administration,”<sup>1</sup> the proceeds are carried into the account, but specific legacies or unsold items of residue are valued by the executors, and if the Commissioners are not satisfied, they may put a value upon them, against which the executors have right of appeal (s. 22). The basis of valuation is, in practice, the same as for Estate Duty,<sup>2</sup> but at the date of retainer, instead of the date of death; but as to reversionary and contingent interests, the value (unless previously adjusted and paid upon by way of composition) is that which is ultimately realised on the interests falling into possession.<sup>3</sup>

**780.** Deduction is allowed, in fixing the amount of a residue, of debts, funeral expenses, legacies, and other charges payable thereout,<sup>4</sup> including any duty on legacies payable free of duty. As regards annuities payable out of residue, the fund retained to meet these may be deducted in the residuary account, and accounted for to duty when set free by the lapsing of the annuity. If, however, it is desired to close the matter, the executor is in practice allowed to limit his deduction to the value of the annuities at the date of the account. In such a case it is stipulated that all the instalments of duty on the annuities should be paid, and an assurance is sought that the annuitants are in fair health, and where annuities are payable free of duty the condition is imposed that the deduction is to be revised in accordance with the facts if the deaths of the annuitants lead to a claim for readjustment of the duty paid on the annuities.<sup>5</sup>

**781.** The value of any annuity for life or lives or for a period of years is calculated according to the Succession Duty tables (s. 8, as amended by s. 31 of the Succession Duty Act, 1853),<sup>6</sup> even if the annuity is directed to be purchased and the price expended exceeds that value (s. 10). In such circumstances the actual price may be deducted in accounting for the residue, instead of either of the alternatives stated above. If, however, a definite sum is directed to be expended in purchasing an annuity, duty is payable on that sum. No allowance is made for any contingency other than death, but if the annuity does in fact terminate on such a contingency, a return of duty is made, reducing the duty to an assessment on the value for the actual duration (s. 8). An annuity charged on and made payable out of another legacy is valued for duty purposes as noted above, as if it had been a direct gift to the annuitant (s. 9). If the benefit given is of such a nature that its value can only be ascertained from time to time by the actual application of the allotted fund, duty is charged on the sums of money, etc.

<sup>1</sup> Per Pollock B. in *Attorney-General v. Dardier*, 1883, 11 Q.B.D. at p. 19.

<sup>2</sup> See para. 688, *supra*.

<sup>3</sup> *Lord Advocate v. Pringle*, 1878, 5 R. 912.

<sup>4</sup> Stamp Act, 1815 (55 Geo. III. c. 184), Schedule Part III.

<sup>5</sup> See para. 791, *infra*.

<sup>6</sup> 16 & 17 Vict. c. 51.

applied from time to time for the purposes directed (s. 11); and under that section fall also advances from capital made by trustees under powers, these being liable to duty as and when made, subject to appropriate allowance in respect of the restriction of any life interest caused by such advances. Where an annuity is directed to be paid free of income tax, the benefit is the full nominal amount of the annuity plus the tax saved to the legatee, and the annuity itself is chargeable under s. 8, and the further benefit (as being liable to variation) is chargeable from time to time under s. 11. In practice, however, the value of the total benefit is arrived at by agreement, and duty is assessed by way of composition on one account.<sup>2</sup>

#### SECTION 4.—EXEMPTIONS.

**782.** Duty is not payable (i) on gifts to the Royal family<sup>3</sup> or the Crown as *ultimus hæres*; (ii) on specific legacies under £20 in value unless the total benefit received by the legatee out of the personal estate of the testator is £20 or over;<sup>4</sup> (iii) where the whole property does not amount to £100;<sup>5</sup> (iv) on plate, furniture, or other things not yielding income and settled upon persons in succession, while enjoyed in kind by a person not having power of disposal (s. 14), these being liable only on sale or the acquiring of an absolute interest;<sup>6</sup> (v) on money left to pay Legacy Duty (s. 21); (vi) on books, pictures, etc. bequeathed to a body corporate for preservation and not for sale;<sup>7</sup> (vii) where the net value for Estate Duty, exclusive of settled property, does not exceed £1000;<sup>8</sup> (viii) where the fixed duty of 30s. or 50s. has been paid on an inventory on estate not exceeding £300 or £500 gross.<sup>9, 10</sup>

#### SECTION 5.—PAYMENT OF DUTY.

##### SUBSECTION (1).—*Persons Accountable.*

**783.** The primary liability is upon the executor in that capacity, but if he retains property for his own benefit, or deducts the Legacy

<sup>1</sup> For examples of the application of this section, see *Attorney-General v. Wade*, [1910] 1 K.B. 703, and *Colville v. Inland Revenue Commrs.*, 1923, S.C. 423.

<sup>2</sup> As to the charge of duty on a share of income netted by payment of income tax, see remarks of Lord President Clyde in *Colville v. Inland Revenue Commrs.*, *supra*.

<sup>3</sup> Stamp Act, 1815 (55 Geo. III. c. 184), Schedule Part III.

<sup>4</sup> *Ibid.*, as amended by the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 42, which renders liable to duty all *pecuniary* legacies though under £20.

<sup>5</sup> Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 13.

<sup>6</sup> *Attorney-General v. Bruce*, [1901] 2 K.B. 391; *Duke of Hamilton v. Lord Advocate*, 1892 (H.L.), 30 S.L.R. 138. As to basis of valuation see *Attorney-General v. Rudge*, 1928, 44 T.L.R. 708.

<sup>7</sup> Legacy Duty Act, 1799 (39 Geo. III. c. 73), s. 1; and Stamp Act, 1815 (55 Geo. III. c. 184), Schedule Part III.

<sup>8</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 16 (3).

<sup>9</sup> Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 36, as extended by s. 16 (1) of the Finance Act, 1894 (57 & 58 Vict. c. 30).

<sup>10</sup> As to exemption from 1 per cent. Legacy Duty, where property has borne Estate Duty, Inventory Duty, or Account Duty, see paras. 774, 775, *supra*; as to exemption and remission in respect of articles of national, etc. interest, see para. 632, *supra*; as to remissions for deaths in war, see para. 634, *supra*; as to marginal abatement, see para. 776, *supra*; and as to the case of foreign domicile, see para. 765, *supra*.



Duty in paying or satisfying a legacy to which a legatee is entitled, the duty is a personal debt to the Crown, and if he makes such payment without deducting the duty, both he and the legatee are debtors to the Crown (s. 6). Where a legacy is to be handed over *in specie*, the duty must be paid by the legatee to the executor before he can require delivery (s. 24), and in the case of an annuity directed to be purchased, the proper course is to pay the duty and purchase an annuity of reduced amount (s. 10). The duty is a charge on the legacy,<sup>1</sup> and any assignee of the legatee is liable, including a purchaser,<sup>2</sup> and moneys received for payment of duty are recoverable by the Crown from the recipient.<sup>3</sup> The duty on an annuity charged on a legacy is payable by the legatee, who may retain the amount in paying the annuity (s. 9); but where a legacy is given to persons in succession all liable at the same rate, the duty payable at once on the *corpus* (see s. 12) is to be paid by the executor, and even if the legatees be liable at different rates, the executor is accountable unless and until he hands the property over to trustees, who are then accountable (ss. 12, 13).<sup>4</sup> The postponed claim on sale or on the acquisition of a power of disposal of articles enjoyed in kind is to be paid by and is a debt of the person selling or acquiring absolutely<sup>5</sup> (s. 14), and the position is similar upon the sale of articles exempted on account of national interest until sold.<sup>6</sup> A legatee becoming entitled by survivorship to a larger interest than that on which duty has been paid is charged with duty as if the property had formed a legacy to him only (s. 16). In any action regarding the administration of an estate, the Court is to make provision for due payment of the Legacy Duty (s. 25),<sup>7</sup> but an omission to do so does not absolve the executor.<sup>8, 9</sup>

#### SUBSECTION (2).—*Appointable Property.*

**784.** Where the deceased has, under a will, a general power of appointment over property in which a limited interest has been given, duty is payable both (1) under the will “upon the execution of such power” as a legacy to the person executing the power, after allowing for any duty previously paid,<sup>10</sup> save that if in default of appointment the property would belong to the person having the power, duty is to

<sup>1</sup> Per Romilly M.R. in *Warbrick v. Varley* (No. 1), 1861, 30 Beav. 241, at p. 242.

<sup>2</sup> *Nisbett's Trs. v. Learmonth*, 1845, 8 D. 69.

<sup>3</sup> *Lord Advocate v. Gordon*, 1901, 8 S.L.T. 439.

<sup>4</sup> See *In re Jones's Trust*, 1852, 21 L.J. Ch. 566.

<sup>5</sup> *Duke of Hamilton v. Lord Advocate*, 1892, 30 S.L.R. 138.

<sup>6</sup> See *In re Scott*; *Scott v. Scott*, [1916] 2 Ch. 268.

<sup>7</sup> See also para. 637, *supra*.

<sup>8</sup> See *Attorney-General v. Chambers*, [1921] 1 K.B. 173, a case on Succession Duty.

As to the extent of the responsibility of the Court, see *Ewing's Trs. v. Mathieson*, 1906 (O.H.), 44 S.L.R. 12; 14 S.L.T. 135.

<sup>9</sup> As to accountability in cases of the exercise of powers of appointment, see para. 784, *infra*, and as to moneys to be applied in the purchase of lands, see para. 772, *supra*.

<sup>10</sup> Presumably, *i.e.* any duty previously paid by the appointor on his limited interest—see comparable provision as to Succession Duty in s. 33 of the Succession Duty Act, 1853, and para. 818, *infra*.

be paid as if the property had been given to him absolutely in the first instance (s. 18); and (2) under the will of the person exercising the power.<sup>1</sup> The accountability for the duties appears to depend on whether or not the appointment is direct to beneficiaries, leaving the original trustees to carry it out, or to trustees or executors who supersede the original trustees in that function,<sup>2</sup> and in the undernoted case<sup>3</sup> it was held that a power of appointment may in this question be general although certain special persons are excluded, and although it bears to be exercisable only by will. A mere declaration in a will that legatees called in the original settlement in default of appointment are to take is not an exercise of a power of appointment,<sup>4</sup> but, on the other hand, where the donee of the power definitely bequeaths the fund to persons entitled under the original settlement in default of appointment, they cannot renounce under the later and take under the prior title.<sup>5</sup> A legacy bequeathed to a person with the condition that if he should predecease it shall fall to his heirs and executors, and becoming by his predecease payable direct to such heirs and executors, is not liable to duty under his will, even though falling to the persons called in his testamentary writings.<sup>6</sup>

**785.** As regards a limited power of appointment among specified objects only, the exercise of this is simply read into the original will, and duty is payable under that will as a legacy to the appointees,<sup>7</sup> or, in default of exercise, as a legacy to those who take in that event under that will (s. 18). It is immaterial whether the appointment be exercised by *inter vivos* deed or by will.<sup>8</sup> The distinction between general and limited powers of appointment "relates, not to conditions affecting the donees of a power, or otherwise antecedent to an appointment, but to the nature of the appointment which may be made under the power."<sup>9</sup>

#### SUBSECTION (3).—*Settled Legacies.*

**786.** Where a legacy or residue is given so as to be enjoyed by different persons in succession all chargeable with the same rate of duty, duty is payable at once on the *corpus* as in the case of a legacy to a single person; but where the persons taking successively are liable at different rates (or where some pay no duty), the life or temporary interests are charged as legacies given by way of annuity as and when

<sup>1</sup> Revenue Act, 1845 (8 & 9 Vict. c. 76), s. 4; see also *In re Cholmondeley*, 1832, 1 Cr. & M. 149.

<sup>2</sup> See Romilly M.R. in *re Philbrick's Settlement*, 1865, 34 L.J. Ch. at p. 369, col. 1.

<sup>3</sup> *Drake v. Attorney-General*, 1843, 10 Cl. & F. 257; but see *Attorney-General v. Astor*, [1923] 2 K.B. 157.

<sup>4</sup> *Lord Advocate v. Routledge's Trs.*, 1907 S.C. 327.

<sup>5</sup> *Attorney-General v. Brackenbury*, 1863, 1 H. & C. 782.

<sup>6</sup> *Lord Advocate v. Bogie*, [1894] A.C. 83; 21 R. (H.L.) 6.

<sup>7</sup> *Attorney-General v. Pickard*, 1838, 3 M. & W. 552, affirmed by Exchequer Chamber, 1840, 6 M. & W. 348.

<sup>8</sup> Per Kindersley V.C. in *Sweeting v. Sweeting*, 1853, 1 Drew. at p. 336.

Per Lord Selborne in *Charlton v. Attorney-General*, 1879, 4 App. Cas. 427, at p. 446.

they arise, and the persons absolutely entitled are charged, when the benefit opens to them, as if there had been an absolute legacy to them on the death (s. 12). Liability to duty on the *corpus* only arises where the liability of all the legatees at the same rate is not in doubt,<sup>1</sup> and has no application to the case of an annuity,<sup>2</sup> but it is not excluded although some of the rights arise under intestacy, and not under the will (s. 15). The reciprocal arrangements with Northern Ireland and the Irish Free State to obviate dual taxation where the forum of administration of a trust has changed are noticed below.<sup>3</sup>

#### SUBSECTION (4).—*Transmitted Successions.*

**787.** Legacy duty is payable on every devolution of a legacy or residue through predeceasing legatees in whom it has vested,<sup>4</sup> and if in the course of these successions there are *prima facie* claims for both Legacy Duty and Succession Duty arising at the same time under different titles, the claim for Legacy Duty stands, and the claim for Succession Duty falls, in terms of s. 18 of the Succession Duty Act, 1853,<sup>5</sup> except in the case of the exercise of a power of appointment.<sup>6</sup>

#### SUBSECTION (5).—*Legacies subject to Contingencies.*

**788.** Where a legacy (other than an annuity) or a residue is bequeathed subject to a contingency which may defeat the gift, which may then go to some other person, it is nevertheless charged with duty as an absolute gift, but if the contingency happens and the legacy falls to some person liable to duty at a higher rate than that paid, the person becoming entitled requires to pay the difference (s. 17). If, however, the contingency is such that persons liable at a lower rate take, there is no statutory provision for readjustment, unless the circumstances are such as to bring the case within the provisions of s. 34.<sup>7</sup> The case of an annuity terminable on a contingency has been already noticed.<sup>8</sup>

#### SUBSECTION (6).—*Compositions of Duty.*

**789.** In addition to the general power to commute any Death Duty given by s. 13 of the Finance Act, 1894,<sup>9</sup> the Commissioners have power to commute the Legacy Duty payable in respect of an interest in expectancy and to give a discharge of the duty;<sup>10</sup> and also, on delivery of an account shewing the property and all necessary particulars as to

<sup>1</sup> *In re Duppa*; *Fowler v. Duppa*, [1912] 2 Ch. 445.

<sup>2</sup> *Crow v. Robinson*, 1862, 4 De G. F. & J. 337.

<sup>3</sup> Para. 797, *infra*.

<sup>4</sup> *Attorney-General v. Malkin*, 1845, 2 Ph. 64; and see *Lord Advocate v. Pringle*, 1878, 5 R. 912.

<sup>5</sup> 16 & 17 Vict. c. 51; and see *Attorney-General v. Littledale*, 1871, L.R. 5 E. & I. App. 290.

<sup>6</sup> *Attorney-General v. Mitchell*, 1881, 6 Q.B.D. 548.

<sup>7</sup> See para. 793, *infra*.

<sup>8</sup> See para. 781, *supra*.

<sup>9</sup> 57 & 58 Vict. c. 30.

<sup>10</sup> Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 11.



beneficiaries, to assess such a sum by way of composition as appears proper, and on payment thereof to give a full discharge.<sup>1</sup>

SUBSECTION (7).—*Method of Accounting.*

**790.** No legacy or residue or any part thereof is to be paid or satisfied by an executor or trustee without his taking a receipt or discharge containing particulars prescribed by the Act (s. 27), which is to be stamped for the amount of duty payable within twenty-one days of its date (s. 29), and unless so stamped the receipt cannot be received in evidence (s. 27).<sup>2</sup> Similarly, where executors are to retain a legacy or residue for their own benefit, they are required before retainer to lodge an account and pay the duty within fourteen days (s. 35). No other stamp duty is required on the receipt (s. 41). If insufficient duty has been paid, the additional duty may be accepted under penalty (s. 30),<sup>3</sup> the penalty not being exacted, however, in cases of innocent mistake. As regards annuities, the only stamped receipts required are for those payments which complete the payments for each of the first four years during which it is payable (s. 27). The present procedure in accounting is to send an account on the appropriate form (as to which see Parliament House Book *sub voce* "Death Duties") to the Estate Duty Office, where it will be examined, and if satisfactory an assessment of the duty will be made, on payment of which the account is stamped and returned to the upgiver.

SUBSECTION (8).—*Interest and Discount.*

**791.** Interest at 4 per cent. is payable on duty in arrear.<sup>4</sup> The only provision for payment of duty otherwise than in one sum is in the case of annuities and liferent interests, the duty on which may be paid by four equal yearly instalments, the first of which is payable on or before completion of the payment of the first year's annuity or liferent, and the others successively on or before completing the succeeding years' payments (s. 8). If instalments are prepaid, discount is allowed (Succession Duty Act, 1853, s. 40),<sup>5</sup> and if the annuity or liferent ceases by the death of the annuitant or liferenter before four years' payment of the annuity, etc. has become due, the duty to be paid is in proportion only to so many of the payments as actually became due. These provisions have no application to a legacy given by way of direction to expend a sum in the purchase of an annuity (s. 10).

<sup>1</sup> Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 43.

<sup>2</sup> A copy of the entry in the books of the Commissioners is, however, evidence of the payment of duty (s. 27), and see *Howe (Earl) v. Lichfield (Earl)*, 1867, L.R. 2 Ch. 155.

<sup>3</sup> As to penalties, see ss. 28, 29, 30, 31 and 35; and also Probate and Legacy Duties Act, 1808 (48 Geo. III. c. 149), s. 44. Acceptance by the Commissioners of arrears of duty, with appropriate interest, implies waiver of penalties—Inland Revenue Act, 1868 (31 & 32 Vict. c. 124), s. 9.

<sup>4</sup> See para. 631, *supra*.

<sup>5</sup> 16 & 17 Vict. c. 51.

SUBSECTION (9).—*Limitation of Liability.*

**792.** An executor giving notice to the Commissioners for any claim in respect of a fund which he intends to distribute, and furnishing all necessary particulars, may distribute the fund on satisfying the claims made, and is entitled to a certificate discharging him of liability in respect of the fund;<sup>1</sup> and no person is liable under a confirmation after the expiry of six years from the date of settlement of an account which was full and true and contained all material facts, and no trustee or executor is liable, after the same period, if the account was correct to the best of his belief.<sup>2</sup>

## SECTION 6.—REPAYMENT OF DUTY.

**793.** In terms of s. 34, where, after payment of duty, any debt is recovered against the estate or any loss happens by reason whereof, or for any other just cause, a legatee is obliged to refund his legacy or the residue or any part thereof, a repayment of duty is to be made on due proof, made on oath, of the circumstances. A formal affidavit appears here to be indicated, but a form is provided by the Estate Duty Office to meet simple cases. Also, in terms of s. 37, where duty is paid by executors whose title is afterwards revoked, it is to be repaid to them,<sup>3</sup> unless such duty ought to have been paid by the rightful executors, in which case it is not returned but is allowed in account with the rightful executors, and is deemed a payment in the due course of administration as if made by the rightful executors. The general power of the Commissioners to remit duty unpaid after the expiration of twenty years from a death has already been referred to.<sup>4</sup>

## PART IV.—SUCCESSION DUTY.

## SECTION 1.—PROPERTY LIABLE.

SUBSECTION (1).—*General.*

**794.** The British Succession Duty, as already shortly explained,<sup>5</sup> is in the nature of an acquisition duty in respect of property forming a succession on death, its rate depending on the relationship between the successor and the person from whom the property is derived. It was imposed by the Succession Duty Act, 1853,<sup>6</sup> which still remains the principal Act governing its levy. Where, therefore, in what follows in Part IV. hereof, any section is referred to without further specification, it is to a section of that Act that reference is made. The rates are graded from 1 to 10 per cent. (with an addition of  $\frac{1}{2}$  per cent. or

<sup>1</sup> Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 12.

<sup>2</sup> Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 14.

<sup>3</sup> See *Reg. v. Commrs. of Stamps and Taxes (Strachey's case)*, 1844, 6 Q.B. 657.

<sup>4</sup> See para. 636, *supra*. <sup>5</sup> See paras. 612 and 621, *supra*. <sup>6</sup> 16 & 17 Vict. c. 51.

1½ per cent. in special circumstances),<sup>1</sup> and while the first-mentioned rate (appropriate to the succession of lineal issue and ancestors) was for a time covered by payment of Estate Duty under the Finance Act, 1894,<sup>2</sup> it was reimposed (to include also a wife or husband) as regards the larger estates by the Finance (1909–10) Act, 1910,<sup>3</sup> which also increased the intermediate rates.

#### SUBSECTION (2).—*Scope of the Levy.*

**795.** Succession Duty is payable under s. 10 on every “succession.” That term is defined by s. 1 as any property chargeable with duty under the Act, and by s. 2 it is declared that a succession is conferred by (a) every disposition of property by reason whereof any person has or shall become beneficially entitled to property, or the income thereof, upon a death, either immediately or after any interval, either certainly or contingently, and (b) every devolution by law of any beneficial interest in property or the income thereof upon a death, to any other person, in possession or expectancy. The term “property” is declared by s. 1 to include both “real property,” in turn defined to include leaseholds and all heritable property except money secured on heritable property in Scotland, and “personal property,” defined to include money so secured, but to exclude leaseholds. The beneficiary is termed the “successor,” and the person from whom his interest is derived is the “predecessor” (s. 2). The duty is thus in terms leviable in respect of all kinds of property and without limitation as regards the type of disposition (*i.e.* whether *inter vivos* or *mortis causa*), provided that the successor becomes entitled on or with reference to a death, but the levy is regarded “as imposed only on those who claim title by virtue of our law.”<sup>4</sup>

#### SUBSECTION (3).—*Foreign Element.*

**796.** This limitation of liability for the duty to persons claiming by virtue of British law has brought before the Courts many cases in which a foreign element is present, either in the disposition, in the property, or in the domicile. It is clear that Succession Duty is not payable on the moveable estate of a person dying domiciled outside Great Britain, although such estate is situate in this country, as regards an immediate and direct succession under a will or intestacy,<sup>5</sup> as the successor does not take by virtue of our law, and it is equally clear that non-British real estate, as such, cannot be dutiable, as it is governed by the *lex rei sitæ*. Where, however, moveable estate has been settled by deed or will so that a succession arises upon a death, Succession Duty may

<sup>1</sup> See para. 809, *infra*.

<sup>2</sup> 57 & 58 Vict. c. 30.

<sup>3</sup> 10 Edw. VII. and Geo. V. c. 8.

<sup>4</sup> Per Lord Cranworth L.C. in *Wallace v. Attorney-General*, 1865, L.R. 1 Ch. 1, at p. 8.

<sup>5</sup> *Wallace v. Attorney-General*, *supra*.



be payable, the claim depending on whether or not the proper forum of administration of the trusts of the disposition is in Great Britain. If the settlement was British in its inception, the forum is British and duty is payable, notwithstanding that the testator's domicile was foreign,<sup>1</sup> that the property was situate abroad,<sup>2</sup> that the beneficiaries were foreigners,<sup>3</sup> or that not all of the trustees were resident in this country;<sup>4</sup> and even where the property consisted of real estate abroad directed to be sold, but in fact unsold, duty was held to be payable.<sup>5</sup> If, however, the settlement was wholly foreign or colonial in its inception, it would seem that it cannot confer a dutiable succession as regards moveable property unless, under a direction or power contained in it, a British trust is created. It is an open question whether (short of a new deed setting up a British trust<sup>6</sup>) any manipulation of a trust disposition originally foreign, and itself containing no direction or power as to its migration, can render it a disposition within the Act.<sup>7</sup> As regards migration of a Scottish trust, see the decision cited below<sup>8</sup> and cases there referred to. Where, however, the succession is not directly under a will made by a foreigner who was full owner of the property, but is under a will so made in exercise of a power of appointment under a British settlement or will, duty is payable.<sup>9</sup>

**797.** From what is said in the preceding paragraph, it will be apparent that if the country to whose laws a trust is subject at its inception charges death duties in the nature of the British Legacy or Succession Duty throughout the entire course of the trust, dual taxation to duties of this nature may occur if the forum of administration of the particular trust should be transferred to Great Britain. With a view to obviating such a possibility, reciprocal arrangements are in force between Great Britain on the one hand, and Northern Ireland and the Irish Free State respectively on the other, under which, when the country of origin of the trust is satisfied that the forum of its administration has passed to the other country, and that Succession Duty is payable in that country, the country of origin of the trust is to allow a sum equal to the amount of the Succession Duty payable in the other country from its own Legacy or Succession Duty.<sup>10</sup>

<sup>1</sup> *Attorney-General v. Campbell*, 1872, L.R. 5 E. & I. App. 524; followed in *Lyall v. Lyall*, 1872, L.R. 15 Eq. 1; and *Duncan's Trs. v. McCracken*, 1888 (O.H.), 15 R. 638.

<sup>2</sup> *Attorney-General v. Jewish Colonisation Assocn.*, [1901] 1 K.B. 123, (C.A.); *Attorney-General v. Felce*, 1894, 10 T.L.R. 337.

<sup>3</sup> *In re Cigala's Settlement Trusts*, 1878, 7 Ch. D. 351.

<sup>4</sup> *Lord Advocate v. Gibson*, 1882, 10 R. 224; *In re Badart's Trusts*, 1870, L.R. 10 Eq. 288.

<sup>5</sup> *Attorney-General v. Johnson*, [1907] 2 K.B. 885.

<sup>6</sup> *In re Smith's Trs.*, 1864, 10 L.T. 598.

<sup>7</sup> *Attorney-General v. Belilios*, 1927, 138 L.T. 294.

<sup>8</sup> *Coates' Trs., Petrs.*, 1925, S.L.T. 18.

<sup>9</sup> *In re Lovelace*, 1859, 4 De G. & J. 340; *In re Wallop's Trust*, 1864, 1 De G. J. & Sm. 656.

<sup>10</sup> As to Northern Ireland, see the Finance Act, 1927 (17 & 18 Geo. V. c. 10), s. 52, and a reciprocal provision in the Finance Act (Northern Ireland), 1927 (17 & 18 Geo. V. c. 11), s. 6 (1); and as to the Irish Free State, see the Relief in Respect of Double Taxation (Succession and Legacy Duty) (Irish Free State) Declaration, 1926 (S.R. & O., 1926, No. 975).

SUBSECTION (4).—*Requisites of a Succession.*

**798.** As has been seen, to constitute a succession there must be a disposition or devolution of property and a beneficial entitlement thereto on death, either immediately or after any interval. The terms "disposition" and "devolution" "comprehend and exhaust every conceivable mode by which property can pass whether by act of parties or by act of the law."<sup>1</sup> "Disposition" covers every act, whether *inter vivos* or testamentary, by which one person confers on another a beneficial interest in property or its income, to arise on a death or after an interval,<sup>2</sup> although the death was of a person not having an interest;<sup>3</sup> and it includes an obligation in an antenuptial contract to pay a sum of money on death,<sup>4</sup> and a gratuitous obligation for charitable purposes,<sup>5</sup> but not a private Act of Parliament which embodied an arrangement with creditors.<sup>6</sup> An ingenious argument that forfeiture on divorce was a disposition was rejected by the Scottish Courts.<sup>7</sup> "Devolution" denotes the transmission of property by operation of law without act of parties, as under intestacy or entailed destination.

**799.** The beneficial interest of a successor which necessitates payment of duty is, under s. 20, an actual enjoyment in possession, and duty was held to be payable where such actual enjoyment arose after the imposition of the duty in 1853, although the right had vested prior to that date;<sup>8</sup> and, accordingly, although the charge of duty arises (under s. 10) "as soon as the disposition is made by which a succession is conferred"<sup>9</sup> and "a succession within the Act once established, no manipulation of the parties afterwards can get rid of it,"<sup>10</sup> the duty is not payable until the succession opens in possession. It is sufficient if a beneficial interest actually opens on death, and the consideration that in other events the same succession might have arisen without reference to the death is not regarded.<sup>11</sup>

**800.** Any beneficial interest in a joint holding accruing by survivorship is a succession (s. 3). The enlargement by death of a life interest into an absolute interest also confers a succession,<sup>12</sup> and the increase of

<sup>1</sup> Per Lord Macnaghten in *Duke of Northumberland v. Attorney-General*, [1905] A.C. at p. 410.

<sup>2</sup> *Attorney-General v. Gell*, 1865, 3 H. & C. 615.

<sup>3</sup> *Ring v. Jarman*, 1872, L.R. 14 Eq. 357.

<sup>4</sup> *Lord Advocate v. Roberts' Trs.*, 1857, 20 D. 449.

<sup>5</sup> *Attorney-General v. Montefiore*, 1888, 21 Q.B.D. 461.

<sup>6</sup> *Lord Advocate v. Jamieson*, 1886, 13 R. 737.

<sup>7</sup> *Lord Advocate v. Montgomery's Trs.*, 1914 S.C. 414.

<sup>8</sup> *Wilcox v. Smith*, 1857, 4 Drew. 40; *Attorney-General v. Middleton*, 1858, 3 H. & N. 125; and see *Lord Advocate v. Constable*, 1880, 7 R. 855.

<sup>9</sup> Per Lord Herschell in *Wolverton v. Attorney-General*, [1898] A.C. at p. 548.

<sup>10</sup> Per Lord Halsbury in *Duke of Northumberland v. Attorney-General*, [1905] A.C. at p. 407.

<sup>11</sup> *Attorney-General v. Noyes*, 1881, 8 Q.B.D. 125.

<sup>12</sup> *Attorney-General v. Robertson*, [1893] 1 Q.B. 293 (C.A.). But the succession is only "the difference between the value of the fund and the life interest she (the successor) previously had," and "s. 38 applies to 'the case . . . in terms,'" per Lord Esher, M.R., at p. 300. As to s. 38, see para. 818, *infra*.

benefit accruing on the extinction by death of a determinable charge or interest, such as an annuity<sup>1</sup> or dower,<sup>2</sup> is a succession to the person entitled beneficially to the property (s. 5). A disposition not conferring an interest expectant on death, but accompanied by the reservation of any benefit for life to the grantor or any other person, confers a succession equal in annual value to the annual value of the reservation (s. 7);<sup>3</sup> and dispositions taking effect only by reference to death, or which, though in form having present effect, by secret trust or arrangement effect a passing of beneficial enjoyment on death, confer successions (s. 8). Under that section also the Court may declare any disposition considered to have been fraudulent and made to evade duty, to have conferred a succession.

SUBSECTION (5).—*Predecessor and Successor.*

**801.** Where the succession is by disposition, the settlor of the property is the "predecessor," but where the succession is by devolution, the last possessor is the "predecessor."<sup>4</sup> As to entails, the maker of the entail is regarded as selecting the various *stirpes*, but within each *stirps* the law takes its course, and accordingly a passing from and to members of the same *stirps* is a succession by devolution, and the last heir of entail is the predecessor;<sup>5</sup> but, on the other hand, where the succession is to a person *nominatim* or to a member of a new *stirps*, he takes by disposition from the maker of the entail as predecessor,<sup>6</sup> any alteration of the maker's intentions by the parties carrying it out being ignored in this connection.<sup>7</sup> In a succession under a disposition, the person actually providing the benefit is the predecessor, and in this question the Court looks at "the substance of the matter and not at any mere technicalities,"<sup>8</sup> so that where a person purchases the right to property vested in another, and directs it to be settled so as to confer a succession, he is the sole predecessor whatever form the disposition may take;<sup>9</sup> a person who by contributing to a benevolent fund becomes entitled under the rules to direct how a sum of money should be applied is the predecessor *quoad* such sum of money;<sup>10</sup> and a person whose acquiescence

<sup>1</sup> See *Lord Advocate v. Macdonald*, 1862, 24 D. 1175.

<sup>2</sup> Per Kindersley V.C. in *Wilcox v. Smith*, 1857, 4 Drew. at p. 55; and see *Harding v. Harding*, 1861, 2 Giff. 597.

<sup>3</sup> *Lord Advocate v. M'Kersies*, 1881 (O.H.), 19 S.L.R. 438; *Crossman v. The Queen*, 1886, 18 Q.B.D. 256.

<sup>4</sup> *Lord Advocate v. Saltoun*, 1858, 21 D. 124; 1860, 3 Macq. 659.

<sup>5</sup> *Lord Advocate v. Saltoun*, *supra*; *Lord Advocate v. Gordon*, 1872, 10 M. 1015; *Zetland v. Lord Advocate*, 1878, 3 App. Cas. 505.

<sup>6</sup> *Lord Advocate v. Drummond*, 1867 (O.H.), 40 Sc. Jur. 21; *Lord Advocate v. M'Culloch*, 1895, 22 R. 356; *Hamilton v. Lord Advocate*, [1920] A.C. 50.

<sup>7</sup> *Lord Advocate v. Murray Graham*, 1884, 12 R. 318; and cf. *Lord Advocate v. Macdonald*, *supra*.

<sup>8</sup> Per Denman J. in *Attorney-General v. Maule*, 1886, 56 L.T. 611, at p. 613.

<sup>9</sup> *In re Jenkinson*, 1857, 24 Beav. 64; *Attorney-General v. Yelverton*, 1861, 7 H. & N. 306; and cf. *Attorney-General v. Baker*, 1859, 4 H. & N. 19.

<sup>10</sup> *Attorney-General v. Abdy*, 1862, 1 H. & C. 266.



validates an invalid appointment is the predecessor as regards successions thereunder.<sup>1</sup> Where the succession is derived from more than one predecessor, and the interest derived from each is not distinguishable, the Commissioners may agree with the successor as to the duty payable, and failing agreement it is deemed that he takes from them equally (s. 13). The "successor" is the person entitled to the succession (s. 2) and may be a body corporate, company, or society (s. 1). Where a succession has, before the successor has become entitled in possession, become vested by alienation (by any title not conferring a new succession)<sup>2</sup> in any other person, such other person, and not the person originally entitled, is the "successor."<sup>3</sup> A successor is not, in general, chargeable with duty upon a succession under a disposition made by himself (s. 12). The nationality or domicile of the successor is of no moment.<sup>4</sup>

**802.** A person having under any disposition a general power of appointment taking effect upon a death is deemed by s. 4, on making appointment thereunder, to become entitled to the property as a succession from the donor of the power, and it follows that the interest of the appointee arising by the exercise of the power must in such a case be held as derived from the appointor.<sup>5</sup> But for this provision the exercise of the power would simply have been read into the original disposition,<sup>6</sup> and the grantor of the power would have been the predecessor;<sup>7</sup> and it is provided by s. 4 that in the case of a limited power of appointment this is to be the position. In the case of resettlements, the predecessor is found in the person who originally provided the property, *e.g.* where property originally stood limited to A. for life with remainder to B. in tail, and was disentailed and resettled to such uses as A. and B. should jointly appoint, and was thereafter appointed, it was held<sup>8</sup> that the case was outside s. 4, and that B. was the sole predecessor, as being the person from whose estate came the interests appointed. A widow's jointure created under the powers of a private Act of Parliament was held to be derived from the husband who exercised his power in her favour.<sup>9</sup>

**803.** The beneficial interest accruing by survivorship in a joint holding is a succession derived from the person on whose death the accruer took place, unless the joint holding was vested in the holders as a succession, in which case the predecessor is the person from whom the

<sup>1</sup> Per Lord Cullen in *Colquhoun's Trs. v. Lord Advocate*, 1918 (O.H.), 2 S.L.T. 83.

<sup>2</sup> See para. 833, *infra*.

<sup>3</sup> Per Lord Macnaghten in *Duke of Northumberland v. Attorney-General*, [1905] A.C. 406, at p. 413.

<sup>4</sup> Per Lord Romilly M.R. in *Lyll v. Lyall*, 1872, L.R. 15 Eq. at p. 10.

<sup>5</sup> *Attorney-General v. Upton*, 1866, 4 H. & C. 336.

<sup>6</sup> Per Turner J. in *In re Lovelace*, 1859, 4 De G. & J. at p. 348.

<sup>7</sup> *In re Barker*, 1861, 7 H. & N. 109; *Attorney-General v. Mitchell*, 1881, 6 Q.B.D. 548.

<sup>8</sup> *Charlton v. Attorney-General*, 1877, 4 App. Cas. 427; see also *Attorney-General v. Sibthorp*, 1858, 3 H. & N. 424; *Braybrooke v. Attorney-General*, 1861, 9 H.L.C. 150; *Attorney-General v. Floyer*, 1862, 9 H.L.C. 477; *Attorney-General v. Smythe*, 1862, 9 H.L.C. 497; and cf. *Attorney-General v. Dowling*, 1880, 6 Q.B.D. 177.

<sup>9</sup> *In re Bolton Estates Act*, 1863, [1904] 2 Ch. 289.

property was derived (s. 3). The succession conferred by the extinction of a charge on property (s. 5) is by that section to be regarded as derived from the person from whom the successor derived title to the property subject to the charge.

SUBSECTION (6).—*Trusts for Charitable Purposes.*

**804.** Where property becomes subject to a trust for charitable or public purposes under a disposition which would, if made in favour of an individual, confer on him a succession, a duty at the rate of 10 per cent. is payable upon the amount or principal value of such property, and the trustee may raise the amount of such duty on the security of the property (s. 16). The additional duty of  $1\frac{1}{2}$  per cent. imposed in 1888 is not applicable in this case,<sup>1</sup> but the duty is apparently to be raised and paid at once and not by instalments.

SUBSECTION (7).—*Successions to Corporations, etc.*

**805.** Where any body corporate, company, or society becomes entitled as successor to real or heritable property, duty is assessed on the principal value, but is payable by instalments as in the case of an ordinary successor; and the body corporate, company, or society, or any trustee thereof, may raise the amount of duty on the security of the property (s. 27). The section applies even though the body corporate has become entitled to the succession only as alienee.<sup>2</sup>

SUBSECTION (8).—*Personal Property.*

**806.** In the case of persons dying on or after 1st July 1888, legacies payable out of or charged upon real or heritable estate, or the rents or profits thereof, or out of or upon any moneys to arise from the sale, mortgage, or disposition of real or heritable estate, are not to be liable to Legacy Duty (as formerly) but to Succession Duty, as a succession to personal property (s. 21 (2) of the Customs and Inland Revenue Act, 1888).<sup>3</sup> The interest of any person in moneys to arise from the sale of heritage under a trust for sale is chargeable as personal property unless such moneys are subject to a trust for re-investment in heritage to which the successor would not be absolutely entitled (s. 29). The interest of a successor in personal property subject to a trust for the purchase of heritable property to which such successor would be absolutely entitled is chargeable as personal property (s. 30).

SUBSECTION (9).—*Policies of Assurance, Post obit Bonds, etc.*

**807.** A life insurance policy does not create the relation of pre-decessor and successor between the insurers and the assured, or between

<sup>1</sup> *Lord Advocate v. Marshall*, 1893 (O.H.), 30 S.L.R. 599.

<sup>2</sup> *Solicitor-General v. The Law Reversionary Interest Society*, 1873, L.R. 8 Ex. 233.

<sup>3</sup> 51 & 52 Vict. c. 8.

the insurers and any assignee of the assured, and no bond or contract made by any person *bona fide* for valuable consideration in money or money's worth for payment of money after the death of any other person creates that relation between the contracting parties; but any disposition or devolution of the moneys payable under such policy, bond, or contract may confer a succession (s. 17). As has been pointed out,<sup>1</sup> the former part of this provision appears to be unnecessary, but it follows from the latter part that if an assured assigns a policy during his lifetime by way of gift, and continues to pay the premiums or arranges for this being done, duty is payable.<sup>2</sup> If, however, the assignment was absolute and the donee pays all premiums after the date of gift, no succession arises,<sup>3</sup> and duty is not payable by a person who has acquired right to policies as part of an onerous transaction,<sup>4</sup> or by the survivor in a tontine.<sup>5</sup> Where purchasers of sums payable on death settle them by deed so as to confer successions, duty is payable under their disposition,<sup>6</sup> but not where a person entitled as at his death to moneys from a fund has nominated these to a lender by way of mortgage.<sup>7</sup> Marriage consideration is not valuable consideration in money or money's worth,<sup>8</sup> and in an antenuptial contract mutual pecuniary obligations are not in consideration of each other, but of the marriage.<sup>9</sup>

#### SUBSECTION (10).—*Compromised Successions.*

**808.** Sec. 32 makes applicable to personal property in questions of Succession Duty the provisions of s. 23 of the Legacy Duty Act, 1796,<sup>10</sup> and the points stated as applicable to Legacy Duty under the title "Compromised Legacies" in Part III.<sup>11</sup> apply (where appropriate) to successions in personal property. As regards heritable property, however, although a special legatee or heir of provision assigns part of his succession by way of compromise, if the instrument under which his succession arises stands unchallenged, he is held to have succeeded thereunder to the whole extent of his succession.<sup>12</sup>

### SECTION 2.—RATES OF DUTY.

#### SUBSECTION (1).—*Rates prior to the Finance (1909–10) Act, 1910.*<sup>13</sup>

**809.** The rates imposed by s. 10 of the principal Act were as follows: Where the relationship of the successor to the predecessor was that

<sup>1</sup> By Jessel M.R. in *Fryer v. Morland*, 1876, 3 Ch. D. 675, at p. 685.

<sup>2</sup> See *Attorney-General v. Public Tr.*, [1920] 3 K.B. 675.

<sup>3</sup> *Lord Advocate v. Fleming or Robertson*, [1897] A.C. 145.

<sup>4</sup> *Lord Advocate v. Earl of Fife*, 1883, 11 R. 222.

<sup>5</sup> *Oldfield v. Preston*, 1862, 3 De G. F. & J. 398.

<sup>6</sup> *In re Jenkinson*, 1857, 24 Beav. 64; *Attorney-General v. Yelverton*, 1861, 7 H. & N. 306.

<sup>7</sup> *In re Maclean's Trusts*, 1874, L.R. 19 Eq. 274.

<sup>8</sup> *Floyer v. Banks*, 1863, 3 De G. J. & Sm. 306; *Lord Advocate v. Sidgwick*, 1877, 4 R. 815.

<sup>9</sup> Per Lord Pres. Inglis in *Lord Advocate v. Sidgwick*, *supra*, at p. 821.

<sup>10</sup> 36 Geo. III. c. 52.

<sup>11</sup> Para 770, *supra*.

<sup>12</sup> *Lord Advocate v. Gordon*, 1895, 22 R. 639; *Lord Advocate v. Christie's Trs.*, 1905 (O.H.), 12 S.L.T. 690.

<sup>13</sup> 10 Edw. VII. and 1 Geo. V. c. 8.



of lineal descendant or ancestor, 1 per cent.; where the relationship was that of a brother or sister or a descendant of such, 3 per cent.; a brother or sister of the father or mother or a descendant of such, 5 per cent.; a brother or sister of a grandfather or grandmother or a descendant of such, 6 per cent.; any other degree of relationship and strangers in blood, including illegitimates, 10 per cent. Relations merely of the husband or wife of the predecessor pay as strangers in blood, but where a successor shall have been married to a spouse more nearly related to the predecessor than he himself is, he pays duty at the lower rate appropriate to that spouse (s. 11). The marriage must have taken place before the dutiable succession took effect, and the fact that the rate of duty is fixed by the circumstances of the case when the succession was created seems to render immaterial a subsequent divorce, even as regards the successions of spouses *inter se* dutiable under the ensuing paragraph. In successions on deaths on and after 1st July 1888, an additional levy of  $\frac{1}{2}$  per cent. in the case of lineal issue and ancestors, and  $1\frac{1}{2}$  per cent. in all other cases, was imposed by s. 21 (1) of the Customs and Inland Revenue Act, 1888,<sup>1</sup> except as regards leaseholds or where Account Duty had been paid under the Customs and Inland Revenue Act, 1881,<sup>2</sup> or where the benefit accruing after 1888 was an increase of an original succession which opened prior to that date, or in respect of property liable to duty as the subject of a charitable trust under s. 16.<sup>3</sup> Where Estate Duty under the Finance Act, 1894,<sup>4</sup> was paid, neither the 1 per cent. Succession Duty nor the additional  $\frac{1}{2}$  per cent. and  $1\frac{1}{2}$  per cent. imposed as above mentioned were payable (s. 1 of that Act); and the 1 per cent. duty was not payable where Inventory or Account Duty had been paid under the Customs and Inland Revenue Act, 1881.<sup>5</sup>

SUBSECTION (2).—*Rates subsequent to the Finance*  
(1909–10) Act, 1910.<sup>6</sup>

**810.** By s. 58 (1) of the Finance (1909–10) Act, 1910, the duty payable under the earlier Act at the rate of 3 per cent. was increased to 5 per cent., and that payable at 5 and 6 per cent. was increased to 10 per cent. The 10 per cent. rate remained unchanged.<sup>7</sup> By s. 58 (2) of the Act of 1910 the duty at 1 per cent. was also directed to be paid notwithstanding any repeal (other than that in s. 16 (3) of the Finance Act, 1894<sup>8</sup>), and was extended to include a husband or wife. The operation of the extended levy was, however, limited as follows:

<sup>1</sup> 51 & 52 Vict. c. 8.

<sup>3</sup> *Lord Advocate v. Marshall*, 1893 (O.H.), 30 S.L.R. 599.

<sup>5</sup> 44 & 45 Vict. c. 12; see also *In re Haygarth's Trusts*, 1883, 22 Ch. D. 545.

<sup>6</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>7</sup> As to illegitimates, see the Legitimacy Act, 1926 (16 & 17 Geo. V. c. 60), and note 3 to para. 775, *supra*.

<sup>8</sup> 57 & 58 Vict. c. 30.

<sup>2</sup> 44 & 45 Vict. c. 12.

<sup>4</sup> 57 & 58 Vict. c. 30.

**811.** (a) The revised rates are not payable in the case of a succession through devolution by law except where the succession arises on or after 30th April 1909, or in the case of a succession under a disposition except where the first succession thereunder arises on or after that date.<sup>1</sup> A succession, to be a first succession in this connection, must be a succession in the sense of the principal Act, and so did not include one which occurred before 1853,<sup>2</sup> and it appears to follow from the decision noted below<sup>3</sup> that a succession after 1909 to the proceeds of foreign real estate is a "first succession" in the sense of the statute, although the real estate itself had, before conversion and without liability to duty, passed on a death subsequent to 1853; and similarly, in regard to a succession to property under the will of a person who died domiciled abroad, the first succession is upon the first death giving rise to a claim for duty. The view adopted by the House of Lords<sup>4</sup> that a first succession arose on the death of a reversionary owner when his legatee became vested in right, though not in possession, was overruled by s. 24 of the Finance Act, 1925,<sup>5</sup> which enacted that a succession should be deemed to arise on the happening of the death by reason of which the successor becomes entitled in possession to the succession or to the income or profits thereof.

**812.** (b) As regards successions made liable at 1 per cent., a further limitation arises in the provision<sup>6</sup> that duty shall not be paid if the principal value of the property passing on the death of the deceased in respect of which Estate Duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose and which on his death passes to persons other than the husband or wife or lineal ancestor or descendant of the deceased) does not exceed £15,000, or if the amount or value of the successor's total succession from the testator, intestate, or predecessor does not exceed £1000, or in the case of a widow, or child under twenty-one, £2000. The "deceased" in the above provision means, in the case of a succession by devolution, the person on whose death the succession arises, and in the case of a succession under a disposition, the person on whose death the first succession thereunder arises.<sup>6</sup>

**813.** The additional  $\frac{1}{2}$  per cent. and  $1\frac{1}{2}$  per cent. rates imposed in 1888 may still be payable if Estate Duty is not exigible.<sup>7</sup>

### SUBSECTION (3).—*Margin Cases.*

**814.** Where the net value of the estate for Estate Duty purposes exceeds £1000, the amount of Legacy and Succession Duty payable is not to exceed the excess over £1000.<sup>8</sup>

<sup>1</sup> Finance (1909–10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 58 (4).

<sup>2</sup> *Hamilton v. Lord Advocate*, [1920] A.C. 50.

<sup>3</sup> In *Lord Advocate v. Macalister*, [1924] A.C. 586.

<sup>4</sup> 15 & 16 Geo. V. c. 36.

<sup>5</sup> By Finance (1909–10) Act, 1910 (10 Edw. VII. and 1 Geo. V. c. 8), s. 58 (2).

<sup>6</sup> *Ibid.*, s. 58 (3).

<sup>7</sup> See para. 809, *supra*.

<sup>8</sup> See para. 776, *supra*.

SUBSECTION (4).—*Gifts free of Duty.*

**815.** Succession Duty is not payable upon any moneys applied to payment of Succession Duty according to any trust for that purpose (s. 18); but a direction in a will that a gift of property liable to Succession Duty is to be paid free of duty confers on the successor a legacy of the amount of the duty which is liable to Legacy Duty, the provision in s. 21 of the Legacy Duty Act, 1796,<sup>1</sup> being only that money directed to be applied in payment of Legacy Duty is not so liable. The judicial construction of testamentary provisions purporting to confer the benefit of exemption from duty has been considered above.<sup>2</sup> It may be added that the expression "legacies and annuities" does not cover a life interest in real estate specifically devised,<sup>3</sup> but "the duties on . . . legacies and annuities" was held to cover Succession Duty,<sup>4</sup> as also was a devise of real property "free of any incumbrances."<sup>5</sup>

**816.** In the case of an annuity charged on a settled fund and declared to be payable duty free, it would seem that the duty should be paid out of the fund,<sup>6</sup> but a contrary view was expressed *obiter* by Kekewich J.,<sup>7</sup> that apart from express stipulation the duty should in such a case be borne by the general estate. Where a person had bound himself to pay within twelve months of his death to the trustee of a settlement a sum "free from all deductions," it was held that the duty was payable by the trustees of the settlement without recourse against the deceased's executors;<sup>8</sup> but an appointment of so much of the trust funds under a settlement as should be "sufficient to raise the net sum of £2000" was held to entitle the appointee to that sum free of duty.<sup>9</sup>

## SECTION 3.—BASIS OF CHARGE.

SUBSECTION (1).—*Real or Heritable Property.*

**817.** In the case of real or heritable property, including leaseholds, not directed to be sold, where the successor is competent to dispose<sup>10</sup> of the property and his succession arose, *i.e.* opened in possession,<sup>11</sup> on or after 2nd August 1894, duty is payable under s. 18 of the Finance Act,

<sup>1</sup> 36 Geo. III. c. 52.

<sup>2</sup> See paras. 739 *et seq.*, *supra*.

<sup>3</sup> *In re King's Trusts*, 1892, 29 L.R. Ir. 401.

<sup>4</sup> *In re Palmer, Leventhorpe v. Palmer*, 1911, Law Times, vol. 131, p. 244. This case came before the Court of Appeal, 1912, 106 L.T. 319, but not on this question.

<sup>5</sup> *In re Nesfield, Barber v. Cooper*, [1914] W.N. 161.

<sup>6</sup> See *Noel v. Henley*, 1819, 7 Pr. 241, 253; and *Stow v. Davenport*, 1833, 5 B. & Ad. 359.

<sup>7</sup> *In re Lewis, Lewis v. Smith*, [1900] 2 Ch. at p. 179.

<sup>8</sup> *In re Higgins, Day v. Turnell*, 1885, 31 Ch. D. 142.

<sup>9</sup> *In re Saunders, Saunders v. Gore*, [1898] 1 Ch. 17 (C.A.); and cf. *In re Currie*, 1888, 57 L.J. Ch. 743.

<sup>10</sup> The expression "competent to dispose" is construable under reference to s. 22 (2) (a) of the Finance Act, 1894, as to which see *ante*, at para. 645. A similar expression in s. 21 of the Succession Duty Act, 1853, was held to have reference to the interest in the property and not to personal capacity (*Attorney-General v. Hallett*, 1857, 2 H. & N. 368).

<sup>11</sup> *Attorney-General v. Anderton*, [1921] 1 K.B. 159; and see Finance Act, 1925 (15 & 16 Geo. V. c. 36), s. 24.



1894,<sup>1</sup> on the principal value of the property, ascertained as for Estate Duty, less any Estate Duty paid and the expense of raising and paying such duty, unless the Estate Duty is not a statutory charge on the property, as in the case of leaseholds taken directly under a will.<sup>2</sup> In all cases where the successor is not competent to dispose of the property forming the succession (including, it would seem, the case of a successor who has, *e.g.* by a settlement of *acquirenda*, cut down his fee-simple interest to a life interest), or in the case of a succession which arose before 2nd August 1894, even if he was so competent, the taxable interest is, under s. 21 of the principal Act, the value of an annuity equal to the annual value of the property<sup>3</sup> from the date of the successor becoming entitled in possession during the rest of his life or any less period of enjoyment, such value being calculated according to the Tables appended to the Act.<sup>4</sup> An heir under a Scottish entail is, for Succession Duty purposes, competent to dispose only if he is entitled to disentail without the consent of subsequent heirs.<sup>5</sup> Where heritable property is directed to be sold, the interest of the successor in the proceeds is chargeable as a succession in personal property,<sup>6</sup> unless such proceeds are subject to a trust for re-investment in heritage to which the successor would not be absolutely entitled, in which case the succession is taxable as a succession to heritable property (s. 29); and where personal property is subject to a trust for the purchase of heritable property to which the successor would not be absolutely entitled, such property is to be chargeable as heritable property (s. 30), the value of the successor's interest being based on an annuity equal to the annual produce of the actual trust property at the time of his becoming entitled in possession (ss. 29 and 30).

**818.** If duty on a life-interest basis is payable, the property must either yield or be capable of yielding income<sup>7</sup> and be not altogether valueless.<sup>8</sup> Allowance is made (s. 22) in estimating the annual value of agricultural land, houses, buildings, etc., of "all necessary outgoings," which include public rates and cost of repairs, but not income tax or property tax or expenses of management.<sup>9</sup> In valuing a succession allowance is also made in respect of incumbrances, but not if these were created by the successor, unless made in execution of a special prior power of appointment (s. 34),<sup>10</sup> or of such a nature as themselves to confer a new succession.<sup>11</sup> Incumbrances created in exercise of a joint power conferred in a disentailing deed on a tenant for life and the tenant

<sup>1</sup> 57 & 58 Vict. c. 30.      <sup>2</sup> *In re Culverhouse, Cook v. Culverhouse*, [1896] 2 Ch. 251.

<sup>3</sup> "The value must be ascertained at the time of the accruer of the succession," per Lord Westbury L.C., in *Attorney-General v. Sefton*, 1865, 11 H.L.C. 257, at p. 268.

<sup>4</sup> These are printed in full in "British Death Duty Acts, 1796-1924," referred to in note to para. 627.      <sup>5</sup> Finance Act, 1896 (59 & 60 Vict. c. 28), s. 23.

<sup>6</sup> See para. 821, *infra*.

<sup>7</sup> See *Lord Advocate v. Duke of Buccleuch*, 1888, 15 R. 333.

<sup>8</sup> *Attorney-General v. Sefton*, 1865, 11 H.L.C. 257.

<sup>9</sup> *In re Elwes*, 1858, 3 H. & N. 719; *In re Cowley*, 1866, L.R. 1 Ex. 288.

<sup>10</sup> As in *Attorney-General v. Floyer*, 1862, 9 H.L.C. 477.

<sup>11</sup> *In re Peyton*, 1861, 7 H. & N. 265.

in tail are not allowable, as having been created by the latter only,<sup>1</sup> but incumbrances created by a Scottish heir of entail by arrangement with the heir-apparent are allowable as having been created by the heir in possession.<sup>2</sup> No allowance is made for contingent incumbrances unless they take effect (s. 35), or in respect of any contingency on the happening of which the property passes to some other person unless and until it does so pass (s. 36), but allowance is competent in respect of any fines, casualties of superiority, compositions, reliefs, or charges incident to the tenure (s. 28). Allowance is also made in respect of monies laid out by the successor prior to possession in substantial repairs or permanent improvements (s. 34). Where the donee of a general power of appointment becomes chargeable with duty in respect of an appointment by him,<sup>3</sup> allowance is given for any duty already paid by him on any limited interest in the property appointed (s. 33). Lastly, in terms of s. 38, such allowance as may be just is given in respect of property which a successor requires to relinquish or is deprived of on taking his succession,<sup>4</sup> but in cases of deaths on and after 1st June 1889, only if the relinquished property was acquired by the successor by title not conferring a succession and it passes from him to some other person.<sup>5</sup> A penalty for wilful neglect to give notice of a succession or to deliver appropriate accounts is imposed by s. 46.

**819.** Certain cases are specially provided for, viz.: (a) timber, as to which see the ensuing subsection; (b) trusts for charitable purposes;<sup>6</sup> (c) successions to corporations;<sup>7</sup> (d) real or heritable property directed to be sold, on which duty is leviable as on a succession to personal property (s. 29);<sup>8</sup> (e) any manor, opened mine, or other real property of a fluctuating yearly income, the annual value of which (where that is the taxable interest) is to be calculated on average profits over an agreed period, or failing agreement taken as 3 per cent. on capital (s. 26). It has been suggested that casualties on Scottish feus fall under this provision, but in practice duty has been charged on the casualties as these became payable "from time to time," under s. 11 of the Legacy Duty Act, 1796,<sup>9</sup> as incorporated in the Succession Duty Act, 1853,<sup>10</sup> by s. 32 thereof, or the duty has been compounded under s. 39 of the latter Act. Where casualties have been redeemed under the provisions of the Feudal Casualties (Scotland) Act, 1914,<sup>11</sup> the assessment of duty presents no difficulty.

<sup>1</sup> *In re Peyton*, 1861, 7 H. & N. 265.

<sup>2</sup> *Lord Advocate v. Earl of Glasgow*, 1875, 2 R. 317.

<sup>3</sup> See para. 802, *supra*.

<sup>4</sup> See *In re Micklethwait*, 1855, 11 Exch. 452; *Braybrooke v. Attorney-General*, 1861, 9 H.L.C. 150; *Inland Revenue Commrs. v. Harrison*, 1874, L.R. 7 E. & I. App. 1; *Le Marchant v. Inland Revenue Commrs.*, 1876, 1 Ex. D. 185, (C.A.); but cf. *Lord Advocate v. Earl of Glasgow*, *supra*; and see also *Attorney-General v. Robertson*, [1893], 1 Q.B. 293.

<sup>5</sup> Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), s. 10 (1).

<sup>6</sup> See para. 804, *supra*.

<sup>7</sup> See para. 805, *supra*.

<sup>8</sup> See para. 817, *supra*.

<sup>9</sup> 36 Geo. III. c. 52.

<sup>10</sup> 16 & 17 Vict. c. 51.

<sup>11</sup> 4 & 5 Geo. V. c. 48.

SUBSECTION (2).—*Timber.*

**820.** In the case of deaths prior to 30th April 1909, where a succession comprises timber, trees, or wood, the successor is charged with duty upon his interest in the net moneys, less all necessary outgoings for the year, received from time to time from sales of such timber, unless those fail to exceed £10 in any year; and he requires to account for the same yearly. If, however, the successor desires to commute the duty, this may be done on the basis of an estimate of the moneys to be received from fellings during the successor's lifetime in a prudent course of management (s. 23). Where woodlands are not capable of yielding any profit apart from the sales of timber, no duty is payable except in respect of such sales.<sup>1</sup> In the case of deaths on or after 30th April 1909, the levy is, by s. 61 (5) of the Finance (1909-10) Act, 1910,<sup>2</sup> as amended by s. 9 of the Finance Act, 1912,<sup>3</sup> put on the same basis as is provided for Estate Duty by these sections,<sup>4</sup> and Succession Duty is payable on the sums received from time to time from sales, after deduction of necessary outgoings.<sup>4</sup> Where the sums so received fall to be retained and invested so as to give the immediate successor a life interest only in the income, duty is in practice assessed on the annual value for the life of the successor, though there is no statutory provision for any levy of duty other than on the capital value of the proceeds of sale.

SUBSECTION (3).—*Personal Property.*

**821.** In the case of personal property other than leaseholds, if the successor takes an absolute interest, Succession Duty is payable at once on capital value, and the same rule applies as regards real or heritable property directed to be sold unless the proceeds are subject to a trust for re-investment in heritable property to which the successor would not be entitled absolutely<sup>5</sup> (s. 29). If the property is to be enjoyed by different persons in succession, the rules applicable to Legacy Duty are applied by s. 32 (incorporating ss. 8, 10, and 12 of the Legacy Duty Act, 1796),<sup>6</sup> so that if all the persons taking in succession are liable at the same rate, duty is payable at once on the corpus, but if not, the interest of a successor taking a life interest or other limited interest is valued in the same way as for Legacy Duty.<sup>7</sup> The annual value chargeable in such circumstances is the actual income yielded by the property, and no deduction for income tax is allowable. The rules as to deduction of incumbrances, etc. are as noted above.<sup>8</sup> Where personal property is subject to a trust for investment in heritable property to which the successor would be absolutely entitled, it is chargeable with duty as personal property, but if the successor would

<sup>1</sup> See *Lord Advocate v. Marquis of Ailsa*, 1881, 9 R. 40.

<sup>2</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

<sup>4</sup> See para. 684, *supra*.

<sup>7</sup> See para. 786, *supra*.

<sup>5</sup> See para. 817, *supra*.

<sup>8</sup> See para. 818, *supra*.

<sup>3</sup> 2 & 3 Geo. V. c. 8.

<sup>6</sup> 36 Geo. III. c. 52.



not be absolutely entitled to the heritable property if purchased it is chargeable only as heritable property (s. 30).<sup>1</sup>

#### SECTION 4.—EXEMPTIONS FROM DUTY.

##### SUBSECTION (1).—*By Reason of Value.*

**822.** Where the amount of the whole succession or successions derived from the same predecessor and passing upon any death to any person or persons does not amount to £100 in money or principal value, no duty is payable (s. 18). The further provision of that section exempting any succession of less value than £20 was abolished as regards deaths on or after 1st June 1889 by s. 10 (2) of the Customs and Inland Revenue Act, 1889.<sup>2</sup> Where the value for Estate Duty, exclusive of property settled otherwise than by the will of the deceased, does not exceed £1000, or where the fixed Estate Duty has been paid, no Succession Duty is payable (s. 16 (3) of the Finance Act, 1894).<sup>3</sup> As to limitation of the claim where the estate slightly exceeds £1000, see “Margin Cases.”<sup>4</sup>

##### SUBSECTION (2).—*Where Predecessor is Successor.*

**823.** A successor is not chargeable with duty on a succession under a disposition made by himself, *i.e.* where the predecessor and the successor are the same person (s. 12), but this exemption does not arise where at the date of the disposition the predecessor owned in reversion only and the liferenter dies during the continuance of the disposition. The section also provides that no person shall be chargeable upon the extinction or determination by death of any charge, estate, or interest created by himself unless at the date of the creation thereof his interest was only an interest in reversion. The question who is predecessor has been already discussed.<sup>5</sup>

##### SUBSECTION (3).—*Transactions for Money Consideration.*

**824.** Transactions of the nature of *bona fide* sales for full consideration in money or money's worth are not liable, *e.g.* a conveyance under reservation of a liferent where the disponee had paid an adequate price, as the Act imposes the duty only on “persons succeeding . . . by gratuitous title”<sup>6</sup> (see ss. 7, 17). The consideration must, however, be money or money's worth, and the consideration of marriage is not sufficient,<sup>7</sup> nor the discharge of a possible right to dower,<sup>7</sup> nor mutual pecuniary obligations in a marriage contract.<sup>8</sup> A transaction must, however, be taken as a whole, and the consideration need not be the

<sup>1</sup> See para. 817, *supra*.

<sup>2</sup> 52 & 53 Vict. c. 7.

<sup>3</sup> 57 & 58 Vict. c. 30.

<sup>4</sup> See para. 776, *supra*.

<sup>5</sup> See para. 801, *supra*.

<sup>6</sup> Per Jessel M.R. in *Fryer v. Morland*, 1876, 3 Ch. D. at p. 681.

<sup>7</sup> Per Westbury L.C. in *Floyer v. Bankes*, 1863, 3 De G. J. & Sm. at p. 312.

<sup>8</sup> *Lord Advocate v. Sidgwick*, 1877, 4 R. 815.

exact value;<sup>1</sup> but where it is obviously inadequate, duty may be payable on the balance,<sup>2</sup> or the transaction may be regarded as excluded altogether from the category of *bona fide* sale.<sup>3</sup> There is no succession between the subscribers to a tontine, the relationship between them arising merely by contract.<sup>4</sup> Life assurance policies and *post obit* bonds for value have been treated above.<sup>5</sup>

#### SUBSECTION (4).—*By Payment of Other Duties.*

**825.** No person charged with Legacy Duty under the Legacy Duty Acts in respect of any property is chargeable also with Succession Duty in respect of the same acquisition of the same property (s. 18). It has been held<sup>6</sup> that where property forming the subject of a succession under a marriage contract became liable to Legacy Duty under the will of a predeceasing reversionary owner, the legatees under that will were liable for the Legacy Duty, and being so liable were relieved from any payment of Succession Duty; and the grounds on which that decision was based would seem to cover the case of a reversionary legacy liable to Legacy Duty which had become, under the appointment of the reversionary owner, the subject of a succession. If, however, the Legacy Duty has been paid on the capital of a settled legacy in the first instance (under s. 12 of the Legacy Duty Act, 1796<sup>7</sup>), such prior payment does not prevent a claim for Succession Duty on the death of a legatee under his appointment.<sup>8</sup> As to exemption from 1 per cent. duty where Estate Duty has been paid, see above.<sup>9</sup>

#### SUBSECTION (5).—*Miscellaneous.*

**826.** Exemption from duty is conferred by s. 18 on moneys directed to be applied in payment of duty on any succession, and on any succession which if it had been a legacy is exempted from duty under the Legacy Duty Acts, *i.e.* under the express provisions of these Acts;<sup>10</sup> and by s. 32, the provisions of s. 14 of the Legacy Duty Act, 1796<sup>7</sup> (relating to plate, furniture, or other things not yielding income and settled on persons in succession), are made applicable to a succession. As to such exemptions from and provision as to Legacy Duty,<sup>11</sup> the

<sup>1</sup> *Lord Advocate v. Earl of Fife*, 1883, 11 R. 222.

<sup>2</sup> As in *Brown v. Attorney-General*, 1898, 79 L.T. 572; but cf. *Re Bateman (Baroness); Attorney-General v. Wreford Brown*, [1925] 2 K.B. 429.

<sup>3</sup> As in *Lord Advocate v. M'Kersies*, 1881 (O.H.), 19 S.L.R. 438; and *Attorney-General v. Johnson*, [1903] 1 K.B. 617 (C.A.).

<sup>4</sup> *Oldfield v. Preston*, 1862, 3 De G. F. & J. 398.

<sup>5</sup> Para. 807, *supra*.

<sup>6</sup> *Attorney-General v. Littledale*, 1871, L.R. 5 E. & I. App. 290; and see *In re Chapman's Trusts*, 1865, 2 H. & M. 447.

<sup>7</sup> 36 Geo. III. c. 52.

<sup>8</sup> *Attorney-General v. Mitchell*, 1881, 6 Q.B.D. 548; and see para. 783, *supra*.

<sup>9</sup> Paras. 809 and 811 *et seq.*, *supra*.

<sup>10</sup> Per Lord Fraser in *Duncan's Tr. v. M'Cracken*, 1888 (O.H.), 15 R. 638; following *Attorney-General v. Fitzjohn*, 1857, 2 H. & N. 465.

<sup>11</sup> Para. 782, *supra*.

exemption and remission of duty on articles of national, historic, scientific, or artistic interest,<sup>1</sup> and partial remission of duty by deaths in war,<sup>2</sup> reference is made to the paragraphs noted.

**827.** A successor is not chargeable with duty in respect of any advowson or church patronage comprised in his succession unless the same or some interest therein is sold by him, in which case duty is payable on the proceeds when sold (s. 24).

#### SECTION 5.—PAYMENT OF DUTY.

##### SUBSECTION (1).—*Persons accountable and the Charge of Duty.*

**828.** The duty is a first charge on the interest of the successor and of all persons claiming in his right in real or heritable property in respect of which the duty is assessed, and on the interest of the successor in personal property in respect of which duty is assessed so long as this is in his ownership or control. The duty is a debt due to the Crown from the successor, and has, in the case of heritable property, priority over all charges and interests created by him (s. 42). Where the successor to heritable property is "competent to dispose" of it, the duty payable on principal value under s. 18 (1) of the Finance Act, 1894,<sup>3</sup> is by that section made a "charge on the property." An heir of entail under a Scottish entail is "competent to dispose,"<sup>4</sup> but, for Succession Duty purposes, only if he is entitled to disentail without consent of subsequent heirs.<sup>5</sup>

**829.** Besides the successor, the following persons are personally accountable for the duty to the extent of the property or funds received or disposed of by them, viz. every trustee, guardian, committee, tutor, or curator in whom any property or the management of any property subject to duty is vested, and every person in whom the same is vested by alienation or other derivative title when the succession becomes an interest in possession (s. 44). All such persons are by that section authorised to compound or commute the duty, to retain it out of the property, or to raise it and incidental expenses at interest on the security of the property, such security having priority over any charge created by the successor; and in the event of non-payment all persons accountable are debtors to the Crown for the unpaid duty (s. 44).

**830.** Accountable persons require to give notice of any succession and to deliver proper accounts to enable the duty to be assessed, in the case of personal property at the time of the first payment, delivery, or satisfaction to or for the successor; and in the case of heritable property when any duty first becomes payable (s. 45). If the Commissioners are dissatisfied with the account, they may, subject to appeal, assess the duty on an estimate made by themselves or on their behalf (s. 45 and Customs and Inland Revenue Act, 1889, s. 10 (3)).<sup>6</sup> The

<sup>1</sup> Para. 632, *supra*.

<sup>2</sup> Para. 634, *supra*.

<sup>3</sup> 57 & 58 Vict. c. 30.

<sup>4</sup> Finance Act, 1894 (57 & 58 Vict. c. 30), s. 23 (15).

<sup>5</sup> *Ibid.*, 1896 (59 & 60 Vict. c. 28), s. 23.

<sup>6</sup> 52 & 53 Vict. c. 7.



accountable parties may be required to produce evidence supporting their account and estimate (s. 49), and if dissatisfied with the assessment of duty may appeal, within twenty-one days of its date, to the Court of Exchequer, or, if the sum in dispute does not exceed £50, to the Sheriff Court (s. 50). The interest of a successor in separate properties may, on his request and where reasonably required, be the subject of separate assessments (s. 43).

**831.** As the successor is personally accountable, he does not escape liability by selling the property, and on his death any unpaid duty is a debt due by his estate; and while the purchaser is not personally accountable where the claim had arisen before he acquired the property, any duty payable on principal value is a charge on the property in his hands, and the purchaser of a reversion who is vested in the property when the succession becomes an interest in possession is expressly made accountable, as stated above. A purchaser is therefore entitled to evidence, though not in any particular form, that duty has been paid,<sup>1</sup> and may insist on an outstanding claim being commuted.<sup>2</sup> Where heritable property is directed to be sold, it is chargeable with duty as a succession to personal property unless the proceeds are directed to be invested in other heritable property (s. 29), and in such a case the duty is not a charge on the property. Similarly, when heritable property is sold by trustees in terms of a power of sale, any succession thereafter arising is considered to be a succession in the proceeds with which the purchaser has no concern, and the position would appear to be the same where the sale is by trustees under the general power conferred by the Trusts (Scotland) Act, 1921,<sup>3</sup> or under special powers granted by the Court in terms of s. 5 of that Act.

**832.** If a trustee (in which term is included an executor or administrator, or any person having or taking on himself the administration of property affected by any express or implied trust)<sup>4</sup> distributes or conveys property without accounting for the duty, he remains personally liable to the Crown for payment, irrespective of the fact that the distribution may have been under Order of Court;<sup>5</sup> and he may be liable also in a question with the successor.<sup>6</sup>

#### SUBSECTION (2).—*Transmitted, Alienated, and Accelerated Successions.*

**833.** The interest of a successor may before he becomes entitled in possession (a) have passed by his death to other successors, (b) have been alienated by him by gift or sale in such a way that no new succession from him is created by such alienation, or (c) have been assigned in

<sup>1</sup> *Earl Howe v. Lichfield*, 1867, L.R. 2 Ch. 155.

<sup>2</sup> *In re Weston and Thomas's Contract*, [1907] 1 Ch. 244.

<sup>3</sup> 11 & 12 Geo. V. c. 58, s. 4.

<sup>4</sup> Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 1.

<sup>5</sup> *Attorney-General v. Chambres*, [1921] 1 K.B. 173.

<sup>6</sup> See *Brown v. Smith*, 1875, 46 L.J. Ch. 866.

such a way as to create a new succession. In the first case (*a*), as regards personal property, one duty only is payable by the successor first becoming entitled in possession, but at the highest rate which, if every succession had been subject to duty, would have been payable by any one of them (s. 14). As regards heritable property, duty is payable only on the new succession taken by the successor first entitled in possession from his immediate predecessor. In the second case (*b*), the person to whom the expectant succession has been assigned without creating a new succession, *i.e.* where the property has been transferred to him in such a way as simply to put him into possession thereof on the death of the original liferenter, is chargeable with duty when he so becomes entitled in possession at the same rate as was appropriate to the original successor (s. 15). In the third case (*c*), where the effect of the alienating deed is not simply to transfer the succession, but to create a new interest out of it or in it, arising on the death, s. 15 has no application, and duty will be exigible on the new succession according to the relationship between the original successor and the person to whom, by the disposition conferring the new succession, he became predecessor.<sup>1</sup> If a person acquires the whole property forming the original succession (by arranging with both liferenter and fiar) and dies in possession, the person succeeding him on his death requires to pay not only the duty on that succession, but requires also, as representing the alienee, to pay, when the original liferenter dies, the duty which the original fiar would have had to pay.<sup>2</sup> If, however, the duty be payable on a life-interest basis, he pays the latter duty on the basis of his own life interest, as he, as taking the beneficial interest, is the "successor" in the sense of the statute.<sup>3</sup> Where a settlement of real property contains power of sale and reinvestment, exercise of the power has the effect of transferring any charge of duty expectantly payable to the property acquired in substitution or to the uninvested proceeds of sale (s. 42).

**834.** Where a succession is accelerated by the surrender or extinction of prior interests, duty is payable at the same time and in the same manner as it would have been paid if no such acceleration had taken place (s. 15). The exercise of a power of appointment which has the effect of vesting property immediately in a person previously entitled defeasibly in remainder is not an acceleration in the sense of the section,<sup>4</sup> nor is the enlargement by death of a life interest into an absolute interest;<sup>5</sup> but the provisions of the section have been held to apply as regards advances made out of settlement funds with consent

<sup>1</sup> *Attorney-General v. Cecil*, 1870, L.R. 5 Ex. 263; and *Attorney-General v. Assheton-Smith*, [1924] 2 K.B. 25; with which contrast *Wolverton v. Attorney-General*, [1898] A.C. 535.

<sup>2</sup> *Duke of Northumberland v. Attorney-General*, [1905] A.C. 406.

<sup>3</sup> Per Lord Macnaghten in *Duke of Northumberland v. Attorney-General*, *supra*; and see also *Solicitor-General v. Law Reversionary Interest Society*, 1873, L.R. 8 Ex. 233.

<sup>4</sup> *Attorney-General v. Selborne*, [1902] 1 K.B. 388 (C.A.).

<sup>5</sup> *Attorney-General v. Robertson*, [1893] 1 Q.B. 293 (C.A.).

of the liferenter,<sup>1</sup> and to the propulsiion of a Scottish entailed estate by the heir in possession to the next heir.<sup>2</sup> Where property is taken out of settlement, the liability for the presumptive claim for duty attaches to the trustees acting at the time,<sup>3</sup> and their safe course is to apply for commutation of the duty under s. 41 of the principal Act, and s. 11 of the Customs and Inland Revenue Act, 1880.<sup>4</sup>

### SUBSECTION (3).—*Time and Method of Payment.*

**835.** The duty is to be paid at the time when the successor or any person in his right or on his behalf becomes entitled in possession to the succession or to receipt of the income and profits thereof; but if there be any prior charge, estate, or interest not created by the successor himself, by reason whereof the successor is not “presently” entitled to the full enjoyment of his succession, duty on the increased value accruing on the determination of such charge is payable only at the time of such determination (s. 20). This increased value is part of the original succession,<sup>5</sup> but in the case of an assessment of duty on a life-interest basis, duty is calculated with reference to the successor’s age at the time of determination of the charge.<sup>6</sup> The section also provides that duty is not payable on the determination of a lease at rack-rent, but a successor entitled to property subject to a beneficial lease requires to pay duty on his interest in any fine or grassum received during his life as consideration for renewal of the lease (s. 25);<sup>7</sup> and by s. 37 it is provided that when a successor does not obtain the whole of his succession at the time of the duty becoming payable, he is to be chargeable with duty only on the value of the profit or benefit from time to time obtained by him. By s. 40 the Commissioners are empowered to receive payment of duty in advance and to allow discount, but discount cannot be allowed where interest is running on the duty, as in the case of instalments under s. 18 (1) of the Finance Act, 1894.<sup>8</sup>

**836.** As regards personal property other than leaseholds, if the successor takes an immediate absolute interest, duty is payable in one sum with interest from the death, and the same position holds as regards personal property settled on persons liable to the same rate of duty (s. 32, incorporating s. 12 of the Legacy Duty Act, 1796),<sup>9</sup> and as regards heritable and leasehold property directed to be sold. Where the succession is not delivered to or retained for the successor until a date subsequent to the death, the accruing income or rents require to be accounted for also, and interest is charged from the date of delivery

<sup>1</sup> *In re Drury Lowe’s Marriage Settlement*; *Ex parte Sitwell*, 1888, 21 Q.B.D. 466.

<sup>2</sup> *Buchan v. Lord Advocate*, [1909] A.C. 166.

<sup>3</sup> *Attorney-General v. Chambres*, [1921] 1 K.B. 173.

<sup>4</sup> 43 Vict. c. 14.

<sup>5</sup> *Cf.* s. 5 and para. 800, *supra*, as to the case where an increase of benefit is a substantive succession.

<sup>6</sup> See *Attorney-General v. Duke of Bedford*, 1926, 135 L.T. 541.

<sup>7</sup> See *Attorney-General v. Mander*, 1896, 65 L.J. Q.B. 246.

<sup>8</sup> 57 & 58 Vict. c. 30.

<sup>9</sup> 36 Geo. III. c. 52.



or satisfaction as in the case of Legacy Duty (s. 45). Where, however, the successor takes a life or other limited interest, the duty assessed on the basis of an annuity for his life<sup>1</sup> is payable by four equal yearly instalments in the same way as Legacy Duty chargeable by way of annuity (s. 32, incorporating ss. 8, 10, and 11 of the Legacy Duty Act, 1796).<sup>2</sup> If the duty be paid in full in advance, discount is allowed, and if the successor dies before all the instalments have become due, those not due cease to be payable, or, if paid, are refunded.

**837.** As regards heritable property: (a) where duty is assessable on the principal value (under Finance Act, 1894, s. 18 (1)),<sup>3</sup> the duty is under that section payable by the same instalments as are authorised by that Act for Estate Duty on heritable property,<sup>4</sup> with interest now at 4 per cent., the first instalment being payable and the interest beginning to run at the expiration of twelve months from the date when the successor becomes entitled in possession to his succession or to receipt of the income and profit thereof; (b) where duty is assessable on the life-interest basis provided in s. 21, the duty is payable either by eight half-yearly instalments, the first of which is to be paid at the expiration of twelve months after the successor becomes entitled to beneficial enjoyment (s. 21), or by two moiety, of which the first is to be paid by four equal yearly instalments, the first instalment being paid at the expiration of twelve months after the successor becomes entitled to beneficial enjoyment, and the second moiety on the day for payment of the last instalment of the first moiety, or if not so paid, by four equal yearly instalments with interest at 4 per cent.<sup>5</sup> The successor may, however, pay in advance under discount, and where a successor who is not competent to dispose by will of a continuing interest<sup>6</sup> in the property dies before all the instalments, if paid half-yearly, would have become payable, the instalments not due cease to be payable, or, if paid, are refunded.

#### SUBSECTION (4).—*Compounding and Commutation of Claims.*

**838.** Where a succession is of such a nature or so circumstanced that the value is not fairly ascertainable under the ordinary rules, or where otherwise expedient, the Commissioners may compound the duty on such terms as they think fit, and give a discharge to the successor, and in special cases may enlarge the time for payment (s. 39). Reference is also made to the general power of compounding all duties in appropriate circumstances noted above.<sup>7</sup>

**839.** In terms of s. 41 of the principal Act, and s. 11 of the Customs and Inland Revenue Act, 1880,<sup>8</sup> the Commissioners are empowered, on

<sup>1</sup> See para. 821, *supra*.

<sup>2</sup> 57 & 58 Vict. c. 30.

<sup>3</sup> Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), s. 22 (1).

<sup>4</sup> See *Attorney-General v. Hallett*, 1857, 2 H. & N. 368; and *Lilford v. Attorney-General*, 1867, L.R. 2 E. & I. App. 63. It follows from the latter case that instalments cease in the case of the succession of an heir of entail who dies without disentailing.

<sup>5</sup> See para. 628, *supra*.

<sup>6</sup> 36 Geo. III. c. 52.

<sup>7</sup> See para. 755, *supra*.

<sup>8</sup> 43 Vict. c. 14.

application, to commute duty presumptively payable by accepting a sum based on the present value of the future claim, taking into account all contingencies affecting liability, and to give a discharge for the duty. In general, commutation of future claims is agreed to only where good reason can be shewn for doing so, and any application should state the whole circumstances in which commutation is considered necessary or desirable. A special form of account is provided by the Estate Duty Office after it has been agreed to commute.

SUBSECTION (5).—*Certificates.*

**840.** The statutory provision for a certificate of payment of Succession Duty is contained in s. 51, which provides that the Commissioners shall deliver to any person interested in the property, on applying for the same for any reasonable purpose, a certificate of payment of duty, and such a certificate is issued if requested. The practice is, however, to give an assurance in the form of a letter that no claim is outstanding, which is sufficient evidence to a purchaser that the property is free of any claim.<sup>1</sup> Where duty is compounded or commuted the Commissioners may give discharges to the successor (ss. 39, 41), and where an executor or trustee has given notice in writing to the Commissioners for any claim in respect of funds in his hands which he intends to distribute, and has furnished all necessary information, he is entitled, on meeting any claim made, to receive a certificate discharging him (but no other person) from liability.<sup>2</sup>

SUBSECTION (6).—*Limitation of Liability and Protection of Purchasers.*

**841.** The provisions of ss. 12 to 14 of the Customs and Inland Revenue Act, 1889,<sup>3</sup> which were originally enacted as regards Succession Duty, limiting the liability of executors after six years from the settlement of accounts, and that of purchasers and mortgagees after six years from notice of the succession, were made applicable also as regards Estate Duty by s. 8 (2) of the Finance Act, 1894,<sup>4</sup> and are noted above.<sup>5</sup> By s. 15 of the Act of 1889<sup>3</sup> the notice referred to in that Act is to be lodged in duplicate in prescribed form.

**842.** Relief to purchasers of reversionary interests is also conferred by s. 21 (3) of the Finance Act, 1894,<sup>4</sup> and by s. 64 of the Finance (1909–10) Act, 1910.<sup>6</sup> As regards the former, if the interest has been *bona fide* sold prior to 2nd August 1894, the purchaser cannot be called on to pay duty on heritable property on capital value as imposed by

<sup>1</sup> *Earl Howe v. Lichfield*, 1867, L.R. 2 Ch. 155.

<sup>2</sup> Customs and Inland Revenue Act, 1880 (43 Vict. c. 14), s. 12; see also "*Funds in manibus curiæ*," para. 637, *supra*, in regard to Rules of Court made in pursuance, *inter alia*, of s. 53 of the principal Act.

<sup>3</sup> 52 & 53 Vict. c. 7.

<sup>4</sup> 57 & 58 Vict. c. 30.

<sup>5</sup> Paras. 756 and 757, *supra*.

<sup>6</sup> 10 Edw. VII. and 1 Geo. V. c. 8.

s. 18 of the Finance Act, 1894,<sup>1</sup> but only on the pre-1894 basis of life interest; and as regards the second, if the sale was before 30th April 1909, the purchaser escapes the higher rates of Succession Duty imposed by the Act of 1910. A similar relief is given to a mortgagee, but in such a case the higher duty remains payable by the successor, though ranking as a charge subsequent to the mortgage.

**843.** A receipt and certificate (presumably in terms of s. 51)<sup>2</sup> purporting to be in discharge of the whole duty payable in respect of any succession exonerates a *bona fide* purchaser for valuable consideration, and without notice, from any further claim; and no such purchaser under a title not appearing to confer a succession is subject to duty chargeable by reason of extrinsic circumstances of which he did not have notice (s. 52).

#### SECTION 6.—REPAYMENT OF DUTY.

**844.** Under the provisions of s. 37, where it is proved to the satisfaction of the Commissioners that duty, not being due from the person paying it, was paid by mistake, or was paid in respect of property which the successor has been unable to recover, or from or of which he has been evicted or deprived by a superior title, or that for any other reason it ought to be refunded, the Commissioners are to refund such duty to the person entitled thereto. Applications for such a refund proceed normally by way of affidavit stating the circumstances, and a form is provided by the Estate Duty Office to meet simple cases. A person who has paid duty in advance is not to be prejudiced thereby in his right to repayment (s. 40).

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<sup>1</sup> 57 & 58 Vict. c. 30.

<sup>2</sup> See para. 840, *supra*.



## ESTATE AND HOUSE AGENT.

*See* AGENCY; EXCISE.

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## ESTATE AND EFFECTS.

*See* SUCCESSION; WILL.

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## ESTATES OF THE REALM.

*See* PARLIAMENT.

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## EVICITION.

*See* LEASE; REMOVING; SMALL LANDHOLDERS.

# EVIDENCE.

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## SECTION I.—INTRODUCTORY.

845. When proof is allowed without any qualification or reservation it is said to be a proof *prout de jure*, or a proof at large,

and the inquiry then proceeds by the leading of judicial evidence. An allowance of proof, in relation to certain rights, may, however, be so expressed as (1) to limit the proof to the writ or oath of party, or (2) to reserve the question of so limiting it to be determined during the proof. Such limited proofs are respectively termed a proof *scripto* and a proof *habili modo*, and in them the competency of leading judicial evidence is qualified or reserved. In addition to an allowance of proof *prout de jure*, the Court may, in relation to certain rights and legal processes, allow proof by (1) the oath on reference, (2) the oath of calumny, (3) the oath *in litem*, (4) the oath in supplement, or (5) the judicial examination, of the party litigant. Such additional means of proof are different in their incidence and effect from judicial evidence.

**846.** In a proof *prout de jure* evidence is considered from the point of view of its admissibility as such. Its rules are of general application, and are defined independently of the character of the right which may happen to be involved, or of the process in which it may fall to be determined. These general rules are concerned only with the relevancy of facts as related to one another, with the relative values of the different sources of evidence, with the privilege of evidence, and with the sufficiency of evidence.

## SECTION 2.—RELEVANCY OF EVIDENCE.

**847.** The term “relevancy” is used in three different connotations, viz. (1) the relevancy of a representation of fact as sufficient to infer a consequence in law for the purpose of supporting the conclusion of, or defence in, an action; (2) the relevancy of a representation of fact as specifying the fact for the purpose of giving notice for proof; and (3) the relevancy of surrounding facts and circumstances as supporting or negating the facts upon which the conclusion in law depends. The last connotation alone is the sphere of relevancy of evidence. The facts upon which the conclusion in law depends, sometimes called the *facta probanda* or facts in issue, are the ultimate facts which it is at once essential and sufficient to establish in order to succeed on any particular plea. In actual experience such ultimate facts do not occur in isolation, but are commonly inferred from, and interpreted in the light of, surrounding facts and circumstances of varying degrees of quality, remoteness, and complexity. For the purpose of controlling the extent to which common experience carries these processes of inference and interpretation certain rules have been established by the practice of the Courts, limiting or extending in different places the ambit of the surrounding facts and circumstances of which as *facta probationis* evidence may be led. The surrounding facts and circumstances are the subject-matter of relevancy of evidence, and for the purpose of its rules may be divided into (1) events or occurrences in nature, (2) acts or deeds of persons, (3) statements or writings of persons, and (4) opinions of persons. The considerations affecting the



relevancy of these classes as *facta probationis* differ among themselves, and also vary with the quality of the facts in issue in relation to which their relevancy falls to be determined.

#### SUBSECTION (1).—*Res Gestæ*.

**848.** Facts in issue form the object-matter of relevancy. A fact in issue is neither relevant nor irrelevant in the evidentiary sense, but is that with reference to which relevancy must be measured. Evidence of such a fact is of necessity not co-terminous with its representation in the written pleadings, but is an enlargement and amplification of it, and such evidence is sometimes called the *res gestæ*. In proving the *res gestæ*, evidence is admissible of all events, acts, statements,<sup>1</sup> and opinions<sup>2</sup> forming part thereof. The ground of admissibility is not relevancy to, but inclusion in, the *res gestæ*. "Words which accompany acts, or which are so connected with them as to arise from co-existing motives, form part of the conduct of the individual, which cannot be rightly understood unless his words as well as his acts are proved."<sup>3</sup> Similarly, opinions formed at the time, in so far as necessary to explain the accuracy with which an event was observed, or the intention with which an act was done or statement made, may form part of the *res gestæ* of the event, act, or statement. The precise limit where the *res gestæ* end, and surrounding facts and circumstances begin, is largely a matter of individual impression in the circumstances of each case.<sup>4</sup>

#### SUBSECTION (2).—*Surrounding Facts and Circumstances*.

**849.** All facts other than those upon which a conclusion in law depends in the particular case are surrounding facts and circumstances. The rules of relevancy are designed for the purpose of determining what surrounding facts and circumstances may be proved as *facta probationis*. As a general rule those surrounding facts and circumstances may be proved which are connected by some substantial link with the facts in issue.

#### SUBSECTION (3).—*Events*.

**850.** Evidence of events and occurrences in nature, not in themselves in issue or forming part of the *res gestæ*, is admitted as relevant when such events and occurrences are causally related to the facts in issue.

<sup>1</sup> *Tennent v. Tennent*, 1890, 17 R. 1205; *M'Laren v. M'Leod*, 1913 S.C. (J.) 61; *Cairns v. Marianski*, 1850, 12 D. 1286; *Mackintosh v. Fraser*, 1859, 21 D. 783; *Longworth v. Yelverton*, 1862, 24 D. 696.

<sup>2</sup> *Bernhardt v. Abrahams*, 1912 S.C. 748; *King v. King*, 1842, 4 D. 590; *Wilson v. Wilson*, 1898, 25 R. 788; *Bennet Clark v. Bennet Clark*, 1909 S.C. 591.

<sup>3</sup> *Dickson*, Evidence, s. 254.

<sup>4</sup> *A. B. v. C. D.*, 1848, 11 D. 289; see also *Pritchard*, 1865, 5 Irv. 88; *Greer v. Stirlingshire Road Trs.*, 1882, 9 R. 1069; *Ovenstone v. Ovenstone*, 1920, 2 S.L.T. 83; *Gilmour v. Hansen*, 1920 S.C. 598.

But even though so related, evidence of them may be deemed irrelevant and so excluded where it would necessitate a substantive inquiry into their own nature.

(i) *Hereditary Insanity.*

**851.** Where A's insanity is in issue, the question whether evidence of the insanity of his near relatives is admissible, as being relevant, depends partly on (1) whether A's insanity is of an inherited character so as to be related as effect to cause,<sup>1</sup> and (2) whether evidence of the existence and character of his relatives' insanity is practicable without opening up another substantive inquiry. The general rule that the unknown cannot explain the unknown operates to exclude evidence of the insanity of relatives where that is as difficult of ascertainment as is the insanity of the *de cuius*.<sup>2</sup>

(ii) *Hereditary Likeness.*

**852.** Where A's legitimacy as the child of a marriage is in question his resemblance to a third party can never be relevant, because the real fact in issue is whether A's mother's husband (also or only) had access within the probable period of conception.<sup>3</sup> Where the fact in issue is whether, in the ordinary course of nature, A's parentage is as alleged, evidence of family resemblance may be admitted as relevant where (1) the points of resemblance are of a hereditary character so as to be related as cause and effect,<sup>4</sup> and (2) where evidence of the resemblance is practicable without opening up another substantive inquiry.<sup>5</sup> Evidence of general resemblance is seldom practicable without embarking on a collateral inquiry of equal difficulty with the main issue itself, and would on that ground generally be excluded.<sup>6</sup>

(iii) *Common Origin.*

**853.** Where quality or appearance inherent in the nature of a particular thing is in issue, evidence of the quality or appearance of another thing may be relevant when it is established that both are parcels of the same original bulk and, since their separation, have

<sup>1</sup> *Houston v. Aitken*, 1912 S.C. 1037 (the insanity said to be hereditary in the family—evidence admitted); *Lord Advocate v. M'Clinton*, 1902, 4 Adam 1 (evidence that insanity in general "is often transmitted" held irrelevant).

<sup>2</sup> *Walker v. M'Adam*, 1806, 13 F.C. 548; *Gilrea*, 1844, 2 Broun 332; *James and George Brown*, 1855, 2 Ir. 154; *Dingwall*, 1867, 5 Ir. 466; *H.M. Advocate v. Laing & Paterson*, 1872, 2 Coup. 222; *Lord Advocate v. Edmonstone*, 1909, 2 S.L.T. 223 (evidence of insanity of relatives requested); *Lord Advocate v. Galbraith*, 1897, 5 S.L.T. 65 (evidence admitted).

<sup>3</sup> *Routledge v. Carruthers*, 20th January 1810, F.C.; 19th May 1812, F.C.; 1816, 4 Dow 392; *Ersk. Inst. i. 4, 49*, Ivory's note.

<sup>4</sup> *Douglas v. Duke of Hamilton*, 1769, 2 Pat. 143; *Day v. Day*, 1784, Nicholas, Adulterine Bastardy, p. 140; *Bagot v. Bagot*, 1878, 1 L.R. Ir. 308; *Slingsby v. Attorney-General*, 1917, 33 T.L.R. 120.

<sup>5</sup> *Sinclair v. M'Arthur*, 12th November 1812, Hume's Coll. of Sess. Papers Winter Session, 1812–13, vol. 115, No. 5; and *Stewart*, 1848, Arkley 471.

<sup>6</sup> *Grant v. Countess of Seafield*, 1926 S.C. 274.

remained subject to the same natural processes.<sup>1</sup> In a question as to the price of one lot of goods, it is relevant to prove the price of another lot in the same market if made by the same manufacturer, at the same time, of the same material.<sup>2</sup> In an action of declarator to establish a servitude at the instance of an inhabitant of a royal burgh, the possession of the other inhabitants is relevant because of the common tie which subsisted between them.<sup>3</sup> In construing a statute, the proceedings upon it of persons other than the parties to the case are irrelevant, there being no privity between them.<sup>4</sup>

#### SUBSECTION (4).—*Acts.*

**854.** Evidence of acts and deeds of persons, not themselves in issue or forming part of the *res gestæ*, may be admitted as relevant when such acts and deeds are done in pursuance of the same intention or with the same knowledge which is part of the facts in issue.

##### (i) *Guilty Intention.*

**855.** In criminal prosecutions, where guilty intention is in issue, evidence of the accused's actings within a limited latitude before and about the date of the crime may be admitted as relevant to the accused's intention at the date of the crime. Evidence that the accused made preparations to procure abortion may be relevant to guilty intention in a charge of murdering the same child after birth, or in a charge of subsequently procuring abortion in a different woman.<sup>5</sup> Evidence that the accused forged documents, or attempted to pass off base coins, may be relevant to intention in a charge of subsequently uttering them.<sup>6</sup> In a charge of obtaining money by false pretences, evidence of the accused having made similar pretences to other parties may be relevant to guilty intention if made about the same time.<sup>7</sup> In a charge of indecent assault upon one victim, evidence of a similar assault upon another victim if committed about the same time may be relevant to guilty intention.<sup>8</sup>

**856.** In civil cases evidence of similar fraudulent representations has generally been excluded on the ground that evidence of them would involve a proof within a proof,<sup>9</sup> or, where admitted, has been held

<sup>1</sup> *Knutsen v. Mauritzen*, 1918, 1 S.L.T. 85. On this principle evidence of the quality of a sample of goods may be relevant to the quality of the bulk from which it was taken.

<sup>2</sup> *Whealler v. Methuen*, 1843, 5 D. 402, 1221; *Watson v. Kidston*, 1839, 1 D. 1254; *A. v. B.*, 1858, 20 D. 407.

<sup>3</sup> *Sinclair v. Dysart*, 1779, Mor. 14519; *Thorburn v. Charters*, 1841, 4 D. 169; *Home v. Young*, 1846, 9 D. 286, and the cases there cited; and contrast *Mackenzie v. Learmonth*, 1849, 12 D. 132, and *Smith v. Denny and Dunipace Police Commrs.*, 1879, 6 R. 858; 1880, 7 R. (H.L.) 28.

<sup>4</sup> *Ewing v. Burns*, 1839, MacL. & R. 435, at p. 456.

<sup>5</sup> *H.M. Advocate v. Wishart*, 1870, 1 Coup. 463; *H.M. Advocate v. Rae*, 1888, 15 R. (J.) 80.

<sup>6</sup> *H.M. Advocate v. Barr*, 1927 J.C. 51; *Ritchie and Morison*, 1841, 2 Swin. 581.

<sup>7</sup> *Gallagher v. Paton*, 1909 S.C. (J.) 50.

<sup>8</sup> *H.M. Advocate v. Bickerstaff*, 1926 J.C. 65, at p. 82.

<sup>9</sup> *Inglis v. National Bank of Scotland*, 1909 S.C. 1038.



irrelevant to the question whether the representation in issue was in point of fact made.<sup>1</sup>

(ii) *Motive.*

**857.** It is not essential to prove a particular motive in criminal charges, but the existence of such motive is relevant to guilty intention. In charges of murder, evidence of previous acts of violence,<sup>2</sup> previous expressions indicating malice,<sup>3</sup> or previous discovery in misconduct with a maidservant,<sup>4</sup> has been admitted, in different circumstances, as establishing motives of ill-will, fear of consequences, or the like. In general it is relevant to prove financial stringency as establishing want as a motive in the perpetration of crimes which are shewn to result in financial gain to the accused.<sup>5</sup>

(iii) *Knowledge.*

**858.** In civil and criminal causes where the party's knowledge of the existence of a defect or element of danger in an object at a particular date is in issue, evidence of prior accidents arising therefrom may be relevant if shewn to have been brought to the knowledge of the party at the time.<sup>6</sup>

(iv) *Misconduct.*

**859.** Where the occurrence of sexual intercourse between A and B on a particular occasion of opportunity is in issue, questions arise, in varying circumstances, whether evidence of previous sexual intercourse or familiarities (1) between the same parties, or (2) with a third party is relevant.

**860.** As a general rule it is always relevant to prove between the same parties, (a) in a charge of rape, previous intercourse as relevant to the woman's consent,<sup>7</sup> (b) in affiliation cases, previous or subsequent intercourse as relevant to the parties' intention in keeping company,<sup>8</sup> (c) in actions of divorce for adultery, intercourse during, or previous to, the marriage, as relevant to the knowledge and intention of the paramours,<sup>9</sup> and (d) in actions of declarator of marriage on the grounds of promise *cum subsequente copula*, or cohabitation habit and repute, intercourse prior to the alleged marriage, as relevant to the parties'

<sup>1</sup> *Oswald v. Fairs*, 1911 S.C. 257.

<sup>2</sup> *H.M. Advocate v. Kennedy*, 1907, 5 Adam 347.

<sup>3</sup> *Ross*, 1859, 3 Irv. 434.

<sup>4</sup> *Pritchard*, 1865, 5 Irv. 88.

<sup>5</sup> *Rosenberg*, 1842, 1 Broun 266 (fire raising).

<sup>6</sup> *Cairns v. Boyd*, 1879, 6 R. 1004; *Suttie v. Edinburgh and District Tramways Co.*, 1910, 1 S.L.T. 125; *Gibb v. Edinburgh and District Tramways Co.*, 1912 S.C. 580 (defect in property); *Renwick v. Rotberg*, 1825, 2 R. 855; *Cowan v. Dalziel*, 1877, 5 R. 241; *M'Intyre v. Carmichael*, 1870, 8 M. 570; *Gordon v. Mackenzie*, 1913 S.C. 109 (vice in animals).

<sup>7</sup> *Blair*, 1844, 2 Broun 167.

<sup>8</sup> *Lawson v. Eddie*, 1861, 23 D. 876; *Ross v. Fraser*, 1863, 1 M. 783; *M'Donald v. Glass*, 1883, 11 R. 57; *Buchanan v. Finlayson*, 1900, 3 F. 245; *Havery v. Brownlee*, 1908 S.C. 424; *Florence v. Smith*, 1913 S.C. 978.

<sup>9</sup> *Johnston v. Johnston*, 1903, 5 F. 659; *Dombrowitzki v. Dombrowitzki*, 1895, 22 R. 906.

matrimonial intention.<sup>1</sup> The admission of such evidence proceeds upon the commonly recognised principle of conduct, that a repetition of opportunity is actuated by, and is a continuance of, the original knowledge and the intention of the parties.

**861.** As a general rule it is not relevant to prove specified previous acts of intercourse with a third party in support of an allegation of intercourse with a party, but evidence of previous general conduct or repute as to unchastity may be relevant. A female will not be presumed to be willing to yield her person to A by reason that she previously yielded her person to B, and in cases of rape, therefore, such evidence is irrelevant.<sup>2</sup> But evidence of her general repute for unchastity, though not amounting to *infamia facti*, may be relevant to her credibility in alleging unwillingness.<sup>3</sup> It is doubtful whether evidence of her previous conduct as distinct from her repute is relevant.<sup>4</sup> In an action of damages for rape, evidence that the defender had attempted to ravish other women was deemed irrelevant to the issue of rape of the pursuer.<sup>5</sup> In affiliation cases it is doubtful whether evidence of either party's general repute or conduct as to unchastity is relevant, unless amounting to *infamia facti*.<sup>6</sup> Evidence as to the mother's intercourse with specified third parties about the period of probable conception when received has cast doubt upon the paternity,<sup>7</sup> and when falsely denied has destroyed her credibility.<sup>8</sup>

**862.** In actions of divorce, evidence of the defender's adultery or undue familiarity with specified persons other than the principal paramour may be relevant as shewing the defender's intention in relation to matrimonial obligation.<sup>9</sup> But evidence of the paramour's misconduct with another than the defender is irrelevant.<sup>10</sup> If the paramour allows such evidence to be led he may adduce evidence in contradiction.<sup>11</sup> In actions of declarator of marriage it has been held that evidence of the woman's prior misconduct with third parties is irrelevant to the matrimonial intention of the parties.<sup>12</sup> Such evidence may, however, be relevant where the legitimacy of a child not born *justo tempore* is involved in the action.<sup>13</sup>

<sup>1</sup> *Surtees v. Wotherspoon*, 1873, 11 M. 384; *Maloy v. Macadam*, 1885, 12 R. 431; see also *Cunninghame v. Cunninghame*, 1814, 2 Dow 482; *Lapsley v. Grierson*, 1848, 1 H.L.C. 498; *Campbell v. Campbell*, 5 M. (H.L.) 115; *De Thoren v. Attorney-General*, 1876 L.R. 1 App. Cas. 686; 3 R. (H.L.) 28.

<sup>2</sup> *Dickie v. H.M. Advocate*, 1897, 24 R. (J.) 82, at p. 84; *Allan*, 1842, 1 Broun 500.

<sup>3</sup> *Dickie v. H.M. Advocate*, *supra*; *M'Millan*, 1846, Arkley 209; *Reid & Ors.*, 1861, 4 Irv. 124.

<sup>4</sup> *Webster*, 1847, Arkley 269.

<sup>5</sup> *A. v. B.*, 1895, 22 R. 402.

<sup>6</sup> *Tennant v. Tennant*, 1883, 10 R. 1187.

<sup>7</sup> *Sinclair v. Rankin*, 1921 S.C. 933.

<sup>8</sup> *Butter v. M'Laren*, 1909 S.C. 786.

<sup>9</sup> *Whyte v. Whyte*, 1884, 11 R. 710.

<sup>10</sup> *Johnston v. Johnston*, 1903, 5 F. 659; *King v. King*, 1842, 4 D. 590.

<sup>11</sup> *Stirling v. Stirling*, 1909, 1 S.L.T. 288.

<sup>12</sup> *Macdonald v. Macdonald*, 1863, 1 M. 854; see also *Lang v. Lang*, 1921 S.C. 44.

<sup>13</sup> *Gardner v. Gardner*, 1876, 3 R. 695.

(v) *Character.*

**863.** Evidence that a person has a good or bad character is irrelevant, and therefore inadmissible, except in cases where his character is itself a fact in issue, or so intimately connected therewith as to throw light upon it or upon the *quantum* of damages. In actions of damages for injury to character the pursuer puts the value of his or her character in issue, and evidence for and against the pursuer's reputed character is admissible to prove the amount of damages.<sup>1</sup> Where *veritas* is pleaded and a counter issue taken, the truth of the slander alleged is also in issue and evidence of it may be led. But if no counter issue is taken, the defender cannot lead evidence of *veritas* as relevant to the question of damages.<sup>2</sup> In proof of the *veritas* of an accusation of adultery committed with A, evidence of adultery with B is not relevant either to the *veritas* or to the amount of damages<sup>3</sup>—the latter because to be a bad character is not to have a bad character.<sup>4</sup>

**864.** In England the previous general character of a seduced wife or daughter may be impeached either by general evidence of misconduct, or proof of particular acts, prior to the alleged seduction.<sup>5</sup> On the same principle in Scotland evidence of a husband's profligate habits during marriage has been admitted in an action of damages at his instance against the paramour.<sup>6</sup> In an action of reparation in Scotland, questions as to the pursuer's character, as effecting the *quantum* of damages, were admitted without notice.<sup>7</sup>

The defender's character is held not to be in issue; and, accordingly, it may not be either supported or impugned. But an exception to this rule is allowed in actions of divorce containing a conclusion for damages against the paramour. In such cases evidence may be led, on notice given, as to the value of the defender's character as a spouse.

(vi) *Credibility.*

**865.** The credibility of each witness is put in issue by the party who adduces him. He may be cross-examined as to specific acts and deeds tending to discredit him. If he denies such specific acts substantive evidence of them is deemed irrelevant *ut sit finis*.<sup>8</sup> But if *infamia juris* or *infamia facti* is instantly verifiable as by an extract conviction, or by evidence of general repute, such evidence may be admitted in

<sup>1</sup> *Bern's Exr. v. Montrose Asylum*, 1893, 10 R. 859; *Macdonald v. Begg*, 1862, 24 D. 685.

<sup>2</sup> *Paul v. Jackson*, 1884, 11 R. 460; *Browne v. Macfarlane*, 1889, 16 R. 368.

<sup>3</sup> *H. v. P.*, 1905, 8 F. 232.

<sup>4</sup> *C. v. M.*, 1923 S.C. 1.

<sup>5</sup> Best, Evidence, s. 258; Taylor, Evidence, ss. 356-7.

<sup>6</sup> *Baillie v. Bryson*, 1818, 1 Murray 330; *Brodie v. Blair*, 1834, 12 S. 941; Fraser, H. & W. ii. 1205.

<sup>7</sup> *Butchart v. Dundee and Arbroath Rly. Co.*, 1859, 22 D. 184; *Brash v. Steele*, 1845, 7 D. 539.

<sup>8</sup> *A. v. B.*, 1895, 22 R. 402; *H. v. P.*, 1905, 8 F. 232; and *C. v. M.*, 1923 S.C. 1. In *C. v. M.* Lord Pres. Clyde expresses the view, preluded to by Lord Pearson in *H. v. P.*, that fair notice should be given to the opposite party of an intention to cross-examine him on specific acts going to character and credibility.



supplement of the cross-examination.<sup>1</sup> Introductory matters are relevant to shew a witness's connection with the facts he is adduced to prove, although they may not themselves be directly relevant to the facts in issue.

#### SUBSECTION (5).—*Statements.*

**866.** Evidence of written and verbal statements, not themselves in issue or forming part of the *res gestæ*, or constituting admissible "hearsay,"<sup>2</sup> is generally irrelevant as being too remote. Such evidence may, however, be deemed to be relevant to the facts in issue in special circumstances where the probability of concoction is small. It may also be admissible as being relevant to the credibility of a witness who made the statements.<sup>3</sup>

##### (i) *De Recenti.*

**867.** In the case of offences against women and children it is relevant to prove, both in the civil and the criminal Courts, statements made by the victim so shortly after the offence that concoction is improbable.<sup>4</sup> Even the *de recenti* statement of a weak-minded girl may be proved.<sup>5</sup>

##### (ii) *Against Interest.*

**868.** Evidence of the statements made by a party against his interest in the cause is deemed to be relevant.<sup>6</sup> On this principle, statements made by a partner against the interest of his firm are relevant,<sup>7</sup> and also statements made by the accredited representative of an incorporation against its interest, provided they are statements of fact and not of opinion.<sup>8</sup>

##### (iii) *Made in Presence of Party.*

**869.** Evidence of statements relating to the fact in issue when made in presence of a party are also admitted as relevant to his attitude towards the truth of them.

##### (iv) *Credibility.*

**870.** As relevant to a witness's credibility, (1) it is competent to examine him as to whether he has on any specified occasion made a statement on any matter pertinent to the issue different from the

<sup>1</sup> *Dickie v. H.M. Advocate*, 1897, 24 R. (J.) 82, at p. 84.

<sup>2</sup> See Hearsay, para. 927, *infra*.

<sup>3</sup> *Gibson v. National Cash Register Co.*, 1925 S.C. 500.

<sup>4</sup> *Gilmour v. Hansen*, 1920 S.C. 598, Lord Pres. Clyde at p. 603; *Hill v. Fletcher*, 1847, 10 D. 7; *Stuart*, 1855, 2 Irv. 166; *H.M. Advocate v. Millar*, 1870, 1 Coup. 430; *Anderson v. M'Farlane*, 1899, 1 F. (J.) 36.

<sup>5</sup> *Murray*, 1866, 5 Irv. 232.

<sup>6</sup> See *voce* ADMISSIONS AND CONFESSIONS, Vol. I. p. 161, *ante*.

<sup>7</sup> 53 & 54 Vict. c. 39, s. 15.

<sup>8</sup> *Apthorpe v. Edinburgh Street Tramways Co.*, 1882, 10 R. 344; see also *Livingstone v. Strachan, Crerar & Jones*, 1923 S.C. 794; *Dowling v. Henderson & Son*, 1890, 17 R. 921; and *Shankland v. Robinson*, 1920 S.C. (H.L.) 103.

evidence given by him, and (2) it is competent to adduce evidence to prove that such witness has made such different statement on the occasion specified.<sup>1</sup> The statement may be proved if authorised by the witness, though not made by him personally.<sup>2</sup> But it must have been made or authorised by him before he gave evidence in a different sense.<sup>3</sup> It is competent to prove a statement made on precognition, in the sense that it is within the power of the Court to allow such proof, but not in the sense that the party has an absolute right to such proof.<sup>4</sup> The party adducing the witness may, if he finds it necessary to discredit him, prove such different statement,<sup>5</sup> though made on precognition.<sup>6</sup> The pre-requisite of proof of the different statement is that a foundation for it should be laid in cross-examination of the witness.<sup>5</sup> It is incompetent to prove, before he is adduced, a statement made by an intended witness.<sup>7</sup> The witness to be discredited may be recalled in order that a foundation may be laid and further evidence may be led.<sup>8</sup>

#### SUBSECTION (6).—*Opinions.*

**871.** Evidence of opinions, not themselves in issue or forming part of the *res gestæ*, is as a general rule excluded as irrelevant. The *ratio* of the rule is that the witnesses are not to usurp the function of the tribunal which has to form its own opinion on the matters of fact involved in the case. Thus, where the point was whether certain words were used in their ordinary sense, it was held that the proper form of the question was not "What did you understand by those words?" but "Was there anything to prevent those words from conveying the meaning which they would ordinarily convey?"<sup>9</sup> The rule yields, however, where the subject-matter of the inquiry is such that the tribunal is presumably less capable of forming an opinion regarding it than are experts specially conversant with it, either practically or theoretically.

**872.** Where the causal relationship of particular events and occurrences is in issue the scientific or technical explanation of their operation may be given in evidence by the opinion of experts. In order to be relevant, such opinion evidence must be given (1) by experts specially qualified, and (2) according to the rules of some recognised science or craft, so as to be subject to cross-examination in the light of generally accepted principles.

<sup>1</sup> 15 Vict. c. 27, s. 3.

<sup>2</sup> *Stewart v. Gelot*, 1871, 43 Jur. 578.

<sup>3</sup> *De la Motte v. Jardine*, 1791, 3 Pat. 197; *Begg v. Begg*, 1887, 14 R. 497; *Anderson v. Gill*, 1850, 20 D. 1326, 3 Macq. 180.

<sup>4</sup> *O'Donnell v. M'Guire*, 1855, 2 Irv. 236; *Inch v. Inch*, 1856, 18 D. 997; *Gilmour v. Hansen*, 1920 S.C. 598; *Binnie v. Black*, 1923 S.L.T. 98.

<sup>5</sup> *Gall v. Gall*, 1870, 9 M. 177.

<sup>6</sup> *Shearer v. M'Laren*, 1922 S.L.T. 158.

<sup>7</sup> *Livingstone v. Strachan, Cramer & Jones*, 1923 S.C. 794.

<sup>8</sup> *Robertson v. Stuart*, 1874, 1 R. 532; *Hoey v. Hoey*, 1884, 11 R. 578.

<sup>9</sup> *Daines v. Hartley*, 1848, 3 Ex. 200; see also *Apthorpe v. Edinburgh Street Tramways Co.*, 1882, 10 R. 344; *Dickson*, s. 391.

(i) *Foreign Law.*

**873.** Opinion evidence is relevant to the ascertainment of the jural relationship of particular events according to the law of a foreign country.<sup>1</sup> It must be deponed to by advocates before the supreme Courts of that country,<sup>2</sup> or of a country in which the same system of law is operative,<sup>3</sup> or by persons skilled by reason of their public office.<sup>4</sup> It is doubtful if opinion evidence of English solicitors is relevant.<sup>5</sup> Such evidence is relevant merely as a guide to the Court in deciding with what effect that foreign law applies to the particular facts.<sup>6</sup> Knowledge of the law of a foreign country acquired merely by study at a university in this country is not regarded as sufficient.<sup>7</sup> Where the law in question is that of an English colony, in which English law is administered, the opinion of English counsel has been taken.<sup>8</sup> Where the opinions differ, the Court must deal with the point just as in any other case of conflicting evidence.<sup>9</sup> There are statutory facilities for the ascertainment of the law administered in one part of His Majesty's dominions when pleaded in the Courts of another part thereof,<sup>10</sup> and of the law of foreign countries when pleaded in Courts within His Majesty's dominions.<sup>11</sup>

**874.** A question of law is the proper subject of a remit when made for the purpose of ascertaining the law of a foreign country.<sup>12</sup> In a case tried before a jury, foreign law must be proved by witnesses.<sup>13</sup> When the persons to whom the remit is made differ in opinion, the proper course is to remit to other persons. An opinion will not be remitted for reconsideration unless it be incomplete, or proceed upon some error in fact, or be affected by some irregularity of procedure.<sup>14</sup> If the opinions returned be clear and unanimous the Court will apply them as conclusive of the point remitted.<sup>15</sup> Where the point is one of English, Scots, or Irish law, the House of Lords will not be bound by the opinion.<sup>16</sup>

(ii) *Handwriting.*

**875.** Evidence as to handwriting *comparazione literarum* is sometimes necessary, as a jury is not entitled to proceed on a compari-

<sup>1</sup> *Stuart v. Potter, Choate & Prentice*, 1911, 48 S.L.R. 657.

<sup>2</sup> *Brown's Trs. v. Gregson*, 1920 S.C. (H.L.) 87.

<sup>3</sup> *Macalister's Exrs. v. Macalister*, 1834, 13 S. 171.

<sup>4</sup> *Sussex Peerage case*, 1844, 11 Cl. & Fin. 85, at p. 134.

<sup>5</sup> *Dimwoodie's Exr. v. Carruthers' Exr.*, 1895, 23 R. 243.

<sup>6</sup> *Di Sora v. Phillipps*, 1864, 10 H.L.C. 634; *Kerr v. Fyffe*, 1840, 2 D. 1001; *Thomson's Trs. v. Alexander*, 1851, 14 D. 217.

<sup>7</sup> *Bristow v. Sequeville*, 1850, 5 Ex. 275; *In re Bonelli*, 1875, 1 P.D. 69.

<sup>8</sup> *Thomson's Trs. v. Alexander*, *supra*.

<sup>9</sup> *Kerr v. Fyffe*, *supra*.

<sup>10</sup> 22 & 23 Vict. c. 63.

<sup>11</sup> 24 Vict. c. 11.

<sup>12</sup> *Rutherford v. Carruthers*, 1838, 1 D. 111; *Kerr v. Fyffe*, *supra*; *Welsh v. Milne*, 1844, 7 D. 213.

<sup>13</sup> *Maberly & Co.*, 1834, 12 S. 902.

<sup>14</sup> *Cranstoun v. Cuninghame*, 1839, 1 D. 521; *Galbreath v. Taylor*, 1843, 5 D. 423.

<sup>15</sup> *Baird v. Mitchell*, 1854, 16 D. 1088.

<sup>16</sup> *Stein's Assignees v. Brown*, 1831, 5 W. & S. 47, at p. 54.



son made by themselves alone.<sup>1</sup> Such evidence, however, is only a guide and, in itself, is not of great weight.<sup>2</sup> The weight of such evidence is much greater in disproof than in proof.<sup>3</sup> Even where the witnesses are previously acquainted with the handwriting in question, their evidence should not be regarded as full proof for the Crown in criminal cases.<sup>4</sup> Their intelligence and character,<sup>5</sup> and the nature of the data upon which their opinion is based,<sup>6</sup> are, in civil cases, the measure of the need for corroboration. Their evidence will have weight if they have frequently seen the person write, or have seen writings acted upon and recognised by him as his. The genuineness of the writings upon which the comparison is founded must be undoubted. When they are produced by the alleged granter in impeachment of the document in issue, they must be dated before it.<sup>7</sup> The deed may be compared with writings confessedly genuine—by the Court in cases tried without a jury,<sup>8</sup> or by the jury in both civil and criminal cases.<sup>9</sup>

### (iii) *Identification.*

876. The identification of persons and things is in every case the result of a process of comparison. "You compare in your mind the man you have seen with the man you see at the trial."<sup>10</sup> The opinion as to identity rests on observation of a number of complex facts which are present or absent in the subjects of comparison. It is the result of the comparison which is material to the inquiry, not the complex facts which lead to that result and which, owing to their nature, cannot be brought before the Court. It is improper to bias the mind of a proposed witness to identity by exhibiting to him in preparation for a formal identification a photograph of the person to be identified.<sup>11</sup>

### (iv) *Physical Causation.*

877. Experts in the crafts and sciences are admitted to depone to their opinions as to the probable cause and probable effect of conditions found to exist in the subject-matter of their craft or science. Where such opinion is based only on the experience of the individual expert it cannot be effectively tested by cross-examination and has little weight. Where it is based on an application of the rules of a recognised science

<sup>1</sup> *Gellatly v. Jones*, 1851, 13 D. 961; *H.M. Advocate v. Slater*, 1899, 2 F. (J.) 4.

<sup>2</sup> *Forster v. Forster*, 1869, 7 M. 797; *National Bank v. Campbell*, 1892, 19 R. 885; *Beveridge*, 1860, 3 Irv. 625.

<sup>3</sup> *Ersk.* iv. 4, 71.

<sup>4</sup> *Hume*, ii. 395.

<sup>5</sup> *Forster v. Forster*, *supra*, per Lord Ardmillan.

<sup>6</sup> *Dickson*, *Evidence*, ss. 403, 405.

<sup>7</sup> *Cameron v. Fraser & Co.*, 1830, 9 S. 141; *Ross v. Waddell*, 1837, 15 S. 1219.

<sup>8</sup> *Stirling Stuart v. Stirling Craufurd's Trs.*, 1885, 12 R. 610; *Duff v. Earl of Fife*, 1823, 1 Sh. App. 498, at pp. 512 and 520, per Lord Chancellor Eldon and Lord Redesdale; *Paul v. Harper*, 1832, 10 S. 486.

<sup>9</sup> *Gellatly v. Jones*, *supra*; *H.M. Advocate v. Slater*, *supra*.

<sup>10</sup> *Fryer v. Gathercole*, 1849, 13 Jur. 542, per Parke, B.

<sup>11</sup> *Rex v. Dwyer*, [1925] 2 K.B. 799.

and so can be effectively tested by cross-examination in relation to such rules it is entitled to more weight. The chief value of such experts is to explain the working of the elements involved, in order that the Court may form its own opinion as to causation. Where assessors are sitting to advise the Court expert evidence is excluded.<sup>1</sup>

### SECTION 3.—SOURCES OF EVIDENCE.

**878.** In deciding a question of fact in issue before it, the tribunal may not competently look beyond the facts within judicial knowledge and the evidence led in the action. The facts of judicial knowledge may be described as being those general rules governing the operation of natural events and human affairs, with knowledge of which the Court is seised without special evidence, either by reason that such facts are proper to the fountain of government, or that such facts are constantly accepted as true in the daily practice of the Court.

#### SUBSECTION (1).—*Facts of Judicial Knowledge.*

**879.** The Crown's relationship with foreign states,<sup>2</sup> with the appointed executive,<sup>3</sup> with the Judiciary, and with the established calendar,<sup>4</sup> weights, measures, and coinage, are all facts proper to the fountain of government and as such are taken notice of judicially without special evidence. The Court also takes cognisance of the general facts of nature, such as the normal period of human gestation,<sup>5</sup> possible ages of fertility,<sup>6</sup> mischievous propensities of children,<sup>7</sup> vicious propensities of animals,<sup>8</sup> and the elements of dynamics and physics,<sup>9</sup> apart from any special application in individual instances. The ordinary custom of banking,<sup>10</sup> general economic conditions,<sup>11</sup> and accepted conventions of society<sup>12</sup> are also to some extent within judicial knowledge, as well as the current meaning of words and expressions in the English language.<sup>13</sup>

**880.** Judicial knowledge of fact does not exclude evidence of its application to the particular circumstances of an action, and evidence is necessary of those facts outwith judicial knowledge. The sources of evidence are threefold according as they result in (1) real evidence, (2) oral evidence, or (3) written evidence.

<sup>1</sup> "*S.S. Bogota*" v. "*S.S. Alconda*," 1923 S.C. 526.

<sup>2</sup> *Duff Development Co. Ltd. v. Government of Kelantan*, [1924] A.C. 797.

<sup>3</sup> *Rowland & Kennedy v. Air Council*, 41 T.L.R. 545.

<sup>4</sup> *Goodwin*, 1837, 1 Swin. 431.

<sup>5</sup> *Williamson v. M'Clelland*, 1913 S.C. 678.

<sup>6</sup> *Rackstraw v. Douglas*, 1917 S.C. 284.

<sup>7</sup> *Taylor v. Glasgow Corporation*, 1922 S.C. (H.L.) 1; *M'Kinley v. Darngavil Coal Co.*, 1923 S.C. (H.L.) 34.

<sup>8</sup> *Harper v. Great North of Scotland Rly. Co.*, 1886, 13 R. 1139.

<sup>9</sup> *Ballard v. North British Rly. Co.*, 1923 S.C. (H.L.) 43.

<sup>10</sup> *Crerar v. Bank of Scotland*, 1922 S.C. (H.L.) 137.

<sup>11</sup> *Naismith v. Assessor for Renfrewshire*, 1921 S.C. 615.

<sup>12</sup> *Bennet Clark v. Bennet Clark*, 1909 S.C. 591.

<sup>13</sup> *Taylor v. Wylie & Lockhead Ltd.*, 1912 S.C. 978.

SUBSECTION (2).—*Real Evidence.*

**881.** Where a person or thing, being directly present to the senses of the tribunal, imparts relevant knowledge to the tribunal otherwise than by language, oral or written, the person or thing is a source of real evidence. Real evidence, not being adduced in the form of specific statements of fact, is in an anomalous position in respect (1) that it is not subject to the ordinary tests of admissibility, and (2) that it cannot in all cases be reproduced when the facts are reviewed by a Court of Appeal.

(i) *Persons.*

**882.** In criminal prosecutions for rape of an insane woman, where it is necessary to prove the accused's knowledge of his victim's insanity, it is the practice to adduce the woman and question her in order that the jury may judge whether they should infer that the accused knew she was insane at the time of the act complained of. In such cases the woman is not put on oath or examined as a witness, but is produced as a source of real evidence. It is not competent for the tribunal to take real evidence outwith the presence of the accused.<sup>1</sup> In cases involving proof of paternity the English Court has allowed the offspring to be viewed by the jury as real evidence of family likeness between it and the alleged father.<sup>2</sup> This, however, would probably not be allowed in Scotland.<sup>3</sup>

**883.** Where a number of witnesses are adduced to speak concerning an individual person present in the Court each may identify the person he speaks of by pointing him out. In such cases the person pointed out forms a source of real evidence connecting the testimonies of these witnesses. It is competent to cite a person to appear for identification, and it was at one time the practice to allow the use of photographs as secondary real evidence of the likeness of such person only where he had been so cited and had failed to appear.<sup>4</sup> Modern practice appears to allow the use of photographs as secondary real evidence of likeness, even where the person photographed has not been cited to appear for identification.

**884.** The demeanour of a witness while giving evidence is a source of real evidence relevant to his credibility.<sup>5</sup>

(ii) *Things.*

**885.** In jury practice provision is made for either party obtaining an order from the Court for the jury to view the *locus*, with the object

<sup>1</sup> *Aitken v. Wood*, 1921, J.C. 84.

<sup>2</sup> *Meade v. Meade*, *The Times*, 25th January 1923; and *Russell v. Russell*, *The Times*, 7th March 1923.

<sup>3</sup> *Grant v. Countess of Seafield*, 1926 S.C. 274.

<sup>4</sup> *Forbes v. Forbes*, 1861, 24 D. 145; *Grieve v. Grieve*, 1885, 12 R. 969; *L. v. L.*, 1890, 17 R. 754; *Cassidy v. Cassidy*, 1893, 1 S.L.T. 358; *Gray v. Gray*, 1912, 1 S.L.T. 463.

<sup>5</sup> *Kilpatrick v. Dunlop*, reported in note to *Murray v. Fraser*, 1916 S.C. 631; *Clarke v. Edinburgh and District Tramways Co.*, 1919 S.C. (H.L.) 35.



of making it real evidence in the case.<sup>1</sup> The fact that a jurymen or judge has inspected the *locus* on his own initiative and in the absence of the parties will not in itself justify a new trial or the recall of the decision of the judge.<sup>2</sup> Where a jurymen or judge visits the *locus* independently for the purpose of making experiments or otherwise criticising the evidence led, that may be a ground for granting a new trial or recalling the judge's decision.<sup>3</sup>

**886.** The admissibility of models, plans, and photographs as sources of secondary real evidence of the appearance of things is matter of everyday practice,<sup>4</sup> whether the thing is immoveable, or for some other reason cannot itself be produced, or whether it is unwieldy, or for some other reason cannot conveniently be produced. Where the precise appearance of an unfamiliar thing is material to the case, it is admissible, and may be necessary, (1) to produce the thing itself,<sup>5</sup> (2) to represent the thing by a sample, or (3) to reproduce the thing by means of a model, photograph, or plan, according to circumstances and convenience.

#### SUBSECTION (3).—*Oral Evidence.*

**887.** The knowledge of an individual, when by him personally imparted to the tribunal or to the Commissioner appointed to receive evidence, is said to be a source of oral evidence. In order that his knowledge may become oral evidence the individual must be (1) admissible as a witness, and (2) sworn or otherwise qualified to depone. And in order that it may be available as evidence on behalf of a particular party such individual must be compellable as a witness by that party.

##### (i) *Admissible Witnesses.*

**888.** Under the common and the statute law<sup>6</sup> all persons are competent and admissible witnesses in causes civil and criminal with the following exceptions only:—

##### (a) *Outlaws.*

**889.** So long as the sentence of fugitation remains unrecalled the outlaw is incompetent as a witness in any cause. In the *Monson*<sup>7</sup> case it appears to have been assumed by the Court that the outlaw, Scott, if present, could competently have been examined, but that assumption probably involved the further assumption that if present he would not have been outlawed.

<sup>1</sup> C.A.S., F, i. 9.

<sup>2</sup> *Hope v. Gemmell*, 1898, 1 F. 74; *Sime v. Linton*, 1897, 24 R. (J.) 70.

<sup>3</sup> *Sutherland v. Prestongrange Coal and Firebrick Co. Ltd.*, 1888, 15 R. 494; *Hattie v. Leitch*, 1889, 16 R. 1128.

<sup>4</sup> C.A.S., F, i. 10; and B, iii. 3.

<sup>5</sup> *Ibid.*, B, iii. 3.

<sup>6</sup> 3 & 4 Vict. c. 59; 15 Vict. c. 27; 16 Vict. c. 20; 37 & 38 Vict. c. 64; and 61 & 62 Vict. c. 36.

<sup>7</sup> *H.M. Advocate v. Monson*, 1893, 21 R. (J.) 5, at p. 9.

(b) *Insane Persons.*

**890.** A palpable idiot or a person who is obviously incapable of understanding or answering questions intelligibly will be rejected as an incompetent witness in any cause. Where insanity is not immediately apparent to the Court a preliminary inquiry will not ordinarily be allowed into the proposed witness's degree of intelligence.<sup>1</sup> A certified lunatic is not necessarily incompetent as a witness.<sup>2</sup> The Court, however, has a discretion to reject a certified lunatic if, in view of the nature of the facts to be inquired into and of the state of the lunatic's mind, such a course would not deprive the parties of material evidence.<sup>3</sup>

(c) *Pupils.*

**891.** A child who has not learned to speak is an incompetent witness. When able to speak the incompetency would appear to fly off.<sup>4</sup> Pupils are, however, examined *in initialibus* by the judge as to their knowledge of the obligation to speak truly, and may be rejected if the judge is not satisfied.<sup>5</sup> The Court will not usually allow a child under seven years of age to be examined in proof of adultery.<sup>6</sup>

(d) *Prosecutors.*

**892.** It has been held that the procurator-fiscal or other official actually conducting the prosecution is not competent to be a witness in the case.<sup>7</sup> The Evidence Acts,<sup>8</sup> making a party and the agent acting for him in the proceedings competent witnesses, applied to criminal proceedings, and excepted only the person charged with the crime or offence.<sup>9</sup> The rule of *Graham v. M'Lennan* only applies to exclude the person acting as advocate for the prosecution.

(e) *Persons Present in Court.*

**893.** A person who has been present in Court, without the permission of the Court and without the consent of the party objecting, while evidence is being led is incompetent as a witness unless in the Court of Session, High Court of Justiciary, or Sheriff Court the Judge or Sheriff presiding at the trial is satisfied that such person was not present in consequence of culpable negligence, or criminal intent, and that he has not been unduly instructed, or that injustice will not be done by his examination.<sup>10</sup> In Courts other than those mentioned the

<sup>1</sup> *M'Intyre v. M'Intyre*, 1920, 1 S.L.T. 207.

<sup>2</sup> *Tosh v. Ogilvie*, 1873, 1 R. 254; *Kilpatrick Parish Council v. Row Parish Council*, 1911, 2 S.L.T. 32.

<sup>3</sup> *Buckle v. Kirk*, 1907, 15 S.L.T. 98.

<sup>4</sup> *H.M. Advocate v. Millar*, 1870, 1 Coup. 430 (child of 3½).

<sup>5</sup> *Macbeth*, 1867, 5 Irv. 353.

<sup>6</sup> *Robertson v. Robertson*, 1888, 15 R. 1000.

<sup>7</sup> *Ferguson v. Webster*, 1869, 1 Coup. 370; *Graham v. M'Lennan*, 1911 S.C. (J.) 16.

<sup>8</sup> 5 Vict. c. 27, ss. 1 and 2; and 16 Vict. c. 20, ss. 1, 2, and 3.

<sup>9</sup> *Mackintosh v. Wooster*, 1919 J.C. 15.

<sup>10</sup> 3 & 4 Vict. c. 59, s. 3.

objection is absolute, and a magistrate has no power to admit such person as a witness.<sup>1</sup>

**894.** It is customary for a party and his agent to be present in Court while evidence is being led, but if either is to be adduced as a witness it may be advisable that the permission of the Judge or Sheriff, or the consent of the opposite party, should be obtained, at least in cases where such party or agent would clearly obtain an advantage by hearing the evidence.<sup>2</sup> Expert witnesses are generally permitted to be present while witnesses to fact are being examined, but not while other experts are being examined.

(ii) *Oath or Affirmation.*

**895.** No witness will be admitted to give evidence in a cause, civil or criminal, except upon oath or its recognised equivalent. The object of administering the oath or its equivalent is twofold: (1) to oblige the witness to tell the truth, and (2) to subject the witness to the pains of perjury should he knowingly speak falsely. The essence of the oath or its equivalent is that the witness should expressly undertake to the Court to tell the truth, the content of the obligation to tell being matter for interpretation by the Court.<sup>3</sup>

(a) *The Oath.*

**896.** The words of the oath administered by the Judge to the witness are: "I swear by Almighty God that I will tell the truth, the whole truth, and nothing but the truth." The witness, with right hand uplifted, repeats the words after the Judge. His religious belief is not material to the validity of the oath so taken.<sup>4</sup> Where the witness declares that the forms of a particular ritual are essential to bind his conscience they may be administered. Thus a Jew is sworn with his head covered, and a Mahomedan is sworn on the Koran.

(b) *The Affirmation.*

**897.** Where the witness objects to being sworn and states as the ground of objection either (1) that he has no religious belief, or (2) that the taking of an oath is contrary to his religious belief, he is admitted to give evidence upon solemn affirmation.<sup>5</sup> The words of the affirmation are: "I, A. B., do solemnly, sincerely, and truly declare and affirm that I will tell the truth, the whole truth, and nothing but the truth." <sup>6</sup> No ritual or words of imprecation are necessary or permissible.

(c) *The Declaration.*

**898.** Pupil children are not required to take the oath or make the statutory affirmation. They are only required to promise or declare that they will tell the truth.

<sup>1</sup> *Docharty and Graham v. M'Lennan*, 1912 S.C. (J.) 102.

<sup>2</sup> *Perman v. Binny's Trs.*, 1925, S.L.T. 123; but see *Campbell v. Cochrane*, 1928, S.N. 44.

<sup>3</sup> *M'Laughlin v. Douglas and Kidston*, 1863, 4 Irv. 273.

<sup>4</sup> 51 & 52 Vict. c. 46, s. 3.

<sup>5</sup> *Ibid.*, s. 1.

<sup>6</sup> *Ibid.*, s. 2.



(d) *The Word of Honour.*

899. The rule whereby peers and the widows of peers were formerly, in matters of credulity, allowed to give in their word of honour, instead of, *e.g.*, an oath of calumny, was never established as extending to cases where they were called to testify as witnesses.<sup>1</sup>

(iii) *Compellability of Witnesses.*

900. A person though admissible as a witness may not be compellable to become a witness (1) against the will of a party to the case, or (2) against his own will. In solemn and summary criminal prosecutions the accused person is a competent and admissible witness *in causa*, but cannot in any case be compelled to become a witness against his or her own will.<sup>2</sup> The spouse of the accused person in such prosecutions is a competent and admissible witness *in causa*, but cannot be compelled to become a witness against the will of the person accused<sup>3</sup> except in certain cases, *viz.* (a) at common law the spouse may be compelled against the will of the accused to become a witness where the offence charged is an offence between husband and wife,<sup>4</sup> and (b) under statute the spouse may be compelled against the will of the accused to become a witness where the offence charged is a contravention of certain statutes,<sup>5</sup> or is a charge of bigamy at common law.<sup>6</sup> In criminal prosecutions where the accused's spouse is competent as a witness and compellable against the will of the accused by virtue only of the statute,<sup>7</sup> such spouse nevertheless is not compellable as a witness against his or her own will,<sup>8</sup> except perhaps at the will of the accused. Other statutes contain express provisions whereby in a prosecution the spouse of the accused though compellable against the will of the accused is not compellable against his or her own will.<sup>9</sup>

SUBSECTION (4).—*Written Evidence.*

901. A delivered or communicated writing expressed in language admissive of the writer's deeds or expressive of his intentions or obligations may be presented to the tribunal as a source of written evidence of the writer's deeds, intentions, or obligations. In order that it may be so presented the writing must be either (1) probative, (2) privileged, or (3) admitted or proved.

<sup>1</sup> *Erskine v. Earl of Kincardine*, 1712, 4 Br. Sup. 897; Tait, Evidence, 423; Dickson, Evidence, ss. 1409, 1757. But see *Ramsey v. Nairne*, 1833, 11 S. 1033.

<sup>2</sup> 61 & 62 Vict. c. 36, s. 1 (a).

<sup>3</sup> *Ibid.*, s. 1 (c), modifying 16 Vict. c. 20, s. 3.

<sup>4</sup> *Commelin*, 1836, 1 Swin. 219; *Millar*, 1847, Ark. 355; *Fegan*, 1849, Shaw 261.

<sup>5</sup> 61 & 62 Vict. c. 36, s. 4; *H.M. Advocate v. Lee*, 1923, J.C. 1; *H.M. Advocate v. Macphie*, 1926, J.C. 91.

<sup>6</sup> 4 & 5 Geo. V. c. 58, s. 28 (3).

<sup>7</sup> 61 & 62 Vict. c. 36, s. 4 (1).

<sup>8</sup> *Leach v. Rex*, [1912] A.C. 305, 49 S.L.R. 1032.

<sup>9</sup> *H.M. Advocate v. Fraser*, 1901, 3 F. (J.) 67.

(i) *Probative Deeds.*(a) *In General.*

**902.** Probative deeds occupy a very special position not only in the law of evidence but also in the substantive law of rights and obligations. From the point of view of evidence they conclusively prove their own genuineness as the complete and self-delimited deed of the grantor in the terms they bear. The effect of their terms is a question of construction for the Judge and not a question of fact for the jury. A probative deed is regarded as *probatio probata* of the grantor's intention according to its terms, and is habile to delimit and constitute the grantor's obligation and the grantee's right. The general rule is that a writing in order to be probative must bear to be signed by the grantor, and that the signature must bear to be attested by two or more witnesses whose designations must appear on the face of the deed.<sup>1</sup> But where the grantor is blind or unable to write, the deed is probative if executed notariially.<sup>2</sup>

(b) *Holograph Writs.*

**903.** A signed writing, when proved or admitted to be holograph of the grantor,<sup>3</sup> is probative, and the statutory requirements of attestation do not apply.<sup>4</sup> The same rule applies where the substantial portions though not the whole of the writing are holograph.<sup>5</sup> Where the substantial portions are not holograph the writing will be probative if "adopted as holograph."<sup>6</sup> A holograph will authenticated by initials only has been sustained where it was proved that the grantor frequently subscribed letters by her initials only.<sup>7</sup> In the Commissary Court a will bearing *in gremio* to be holograph of the maker is, if unchallenged, treated as probative without proof of handwriting.<sup>8</sup> The general rule is that a writing proved or admitted to be holograph does not prove its execution as at the date it bears.<sup>9</sup> But a will though not probative of its date is, in the absence of evidence to the contrary, deemed to have been made of the date it bears.<sup>10</sup>

(c) *Other Conclusive Documents.*

**904.** Some documents though neither probative nor privileged in the sense explained are competent and conclusive evidence of the acts they contain. Examples of these are messengers' executions,<sup>11</sup> certifi-

<sup>1</sup> Acts 1681, c. 5; 1696, c. 15; 19 & 20 Vict. c. 89; and 37 & 38 Vict. c. 94, s. 38. *M'Laren v. Menzies*, 1876, 3 R. 1151.

<sup>2</sup> 14 & 15 Geo. V. c. 27, s. 18.

<sup>3</sup> *Gill v. Anderson*, 1858, 3 Macq. 180, 20 D. (H.L.) 7.

<sup>4</sup> Ersk. Inst. iii. 2, 22; *Thiem's Trs. v. Collie*, 1899, 1 F. 764; see also opinions in *Macdonald v. Cuthbertson*, 1890, 18 R. 101.

<sup>5</sup> *Carmichael's Exrs. v. Carmichael*, 1909 S.C. 1387.

<sup>6</sup> *Gavine's Trs. v. Lee*, 1883, 10 R. 448; *Harvey v. Smith*, 1904, 6 F. 511.

<sup>7</sup> *Spiers v. Home Spiers*, 1879, 6 R. 1359.

<sup>8</sup> *Cranston Petr.*, 1890, 17 R. 410.

<sup>9</sup> Ersk. Inst. iii. 2, 22.

<sup>10</sup> 37 & 38 Vict. c. 94, s. 40.

<sup>11</sup> *Gibson v. Clark*, 1895, 23 R. 294; Citation Amendment Act, 1882, s. 4 (3).

cates of incorporation of limited companies,<sup>1</sup> and in certain respects the Valuation Roll<sup>2</sup> and the Voters' Roll.<sup>3</sup>

(ii) *Privileged Writings.*

**905.** The law merchant has permitted obligations contracted *in re mercatoria* to be delimited and constituted by certain writings which, though not probative, are privileged. Such writings are in themselves a source of evidence of contracts *in re mercatoria*, but their genuineness as the writ of the granter is sustained, in the absence of other proof, only where it is not challenged by him.<sup>4</sup> Where their genuineness is not challenged, or is proved, they are *prima facie* evidence of the maker's mercantile obligations according to their terms. The class of writings so privileged is undefined but may be described as co-extensive with the forms of documents for the time being in use to be exchanged between merchants in their mercantile dealings. It includes bills of exchange, promissory notes, cheques, drafts, invoices, bills of lading, orders and acceptances for goods or work, and receipts and acknowledgments of payment or credit.<sup>5</sup> There is no absolute rule that mercantile writings must be signed by the granter. Initials may be sufficient, as in the case of the authentication of the receipt of money paid into bank current account, if that be the customary method.<sup>6</sup>

**906.** A privileged, but non-probative, writing may be so challenged as to throw an onus of proof on the party founding upon it, either (1) by challenging the authentication as not being the signature of the person whose signature it bears to be,<sup>4</sup> or (2) by challenging it as not being genuinely adhibited by the signatory as agent for the obligee.<sup>7</sup>

(iii) *Non-privileged Writings.*

**907.** Writings which are neither privileged nor probative require to be admitted or proved before they can become evidence.<sup>8</sup> Correspondence and other written communications when admitted or proved have a varying value as written adminicles of evidence and may be used to contradict or to corroborate oral evidence.<sup>9</sup> They cannot delimit or constitute obligations.<sup>10</sup>

<sup>1</sup> Companies Consolidation Act, 1908, s. 17.

<sup>2</sup> *Dante v. Assessor for Ayr*, 1922 S.C. 109.

<sup>3</sup> Ballot Act, 1872, s. 7; Representation of the People Act, 1918, s. 14 (3).

<sup>4</sup> *M'Intyre v. National Bank of Scotland*, 1910 S.C. 150.

<sup>5</sup> *Moncrieff v. Sievwright*, 1896, 33 S.L.R. 456; *Kinninmont v. Paxton*, 1892, 20 R. 128; *Stuart v. Potter, Choate & Prentice*, 1911, 48 S.L.R. 657; *Rhind v. Commercial Bank*, 1857, 19 D. 519; 1860, 22 D. (H.L.) 2, 3 Macq. 643; *Couper's Trs. v. National Bank of Scotland*, 1889, 16 R. 412; *Johnston v. Grant*, 1844, 6 D. 875; *National Bank of Scotland v. Campbell*, 1892, 19 R. 885.

<sup>6</sup> *Couper's Trs. v. National Bank of Scotland*, *supra*.

<sup>7</sup> *M'Intyre v. National Bank of Scotland*, *supra*.

<sup>8</sup> *Wylie & Lochhead v. Hornsby*, 1889, 16 R. 907; *M'Naughton v. Finlayson's Trs.*, 1903, 40 S.L.R. 645.

<sup>9</sup> *Coles v. Homer and Tulloch*, 1895, 22 R. 716; *Donaldson v. Tainsh's Trs.*, 1886, 13 R. 967; *Cameron v. Pantons's Trs.*, 1891, 18 R. 728.

<sup>10</sup> *M'Adie v. M'Adie's Exrs.*, 1883, 10 R. 741.



**908.** Account or business books of merchants and others when proved or admitted to be regularly kept are *prima facie* evidence against the person who kept them as his admission of monies received.<sup>1</sup> They have also been held to amount to a *sempilena probatio* against the client or customer to whom payments are recorded.<sup>2</sup> And they have been admitted as adminicles of evidence in proof of the consumption of liquor by a third party,<sup>3</sup> and in a proof of the nature of an injury received by a third party.<sup>4</sup> Such books include the books of bankers,<sup>5</sup> law agents,<sup>6</sup> toll-keepers,<sup>7</sup> and the like; but the privilege is not extended to private books,<sup>8</sup> save in very special circumstances.<sup>9</sup>

**909.** Books forming the official record of matters of public interest, and kept by persons in the performance of a duty imposed by statute, or arising *ex officio*, are generally admissible on production from the proper custody, in proof of facts which it is their function to record; e.g. books kept at Government offices,<sup>10</sup> by the Bank of England,<sup>11</sup> the log-book of a man-of-war,<sup>12</sup> the daily books of a prison,<sup>13</sup> light-house journals, coastguard books,<sup>14</sup> and Kirk Session Records.<sup>15</sup> In some cases books are by statute made *prima facie* evidence of the matters therein contained, and, accordingly, the register of members under the Companies Act is, when proved by an official to be the company register, the proper proof of its contents.<sup>16</sup> It is difficult to say what mode of subscription is essential to the admissibility of the minutes of public bodies.<sup>17</sup> A minute of meeting of Justices of the Peace should be signed.<sup>18</sup> As to the proof of minutes of ancient date see *Lauderdale Peerage*.<sup>19</sup>

**910.** According to the English authorities, an approved public and general history may be admitted to prove ancient matters relating to

<sup>1</sup> *Commercial Bank of Scotland v. Rhind*, 1860, 3 Macq. 643; *British Linen Co. v. Thomson*, 1853, 15 D. 314.

<sup>2</sup> *Ivory & Co. v. Gourlay*, 1816, 4 Dow 467.

<sup>3</sup> *Craig v. Chassels*, 1917, 2 S.L.T. 242.

<sup>4</sup> *Grant v. Edinburgh Corporation*, 1924, S.L.T. 607.

<sup>5</sup> *British Linen Co. v. Thomson*, *supra*; see Bankers' Books Evidence Act, 1879 (42 Vict. c. 11).

<sup>6</sup> *Macqueen & Mackintosh v. Colvin*, 1827, 4 Murray 193.

<sup>7</sup> *Balfour v. Sharp*, 1833, 11 S. 784.

<sup>8</sup> *Paterson v. Blair*, 1819, 2 Murray 179; *Laing v. Hay*, 1829, 1 Deas & And. 23; *Smith v. Logan*, 1826, 5 S. 32; 1830, 4 W. & S. 47; *Catto, Thomson & Co. v. Thomson & Son*, 1867, 6 M. 54.

<sup>9</sup> *Fisher v. Fisher and Ors.*, 1850, 13 D. 245; *Macfarquhar v. M'Kay*, 1869, 7 M. 766.

<sup>10</sup> *Kay v. Rodger*, 1836, 10 S. 831; *Dunbar v. Harvie*, 1820, 2 Bli. 351.

<sup>11</sup> *Mortimer v. M'Callan*, 6 M. & W. 58. <sup>12</sup> *Watson v. The King*, 1815, 4 Camp. 272.

<sup>13</sup> *The King v. Aickles*, 1785, 1 Leach 390.

<sup>14</sup> "Catherina Maria," 1866, L.R. 1 A. & E. 53; *Turner v. Board of Trade*, 1894, 22 R. 18.

<sup>15</sup> *A. v. B.*, 1858, 20 D. 207.

<sup>16</sup> *Caledonian and Dumbartonshire Junction Rly. Co. v. Lockhart*, 1855, 17 D. 917; *Macdonald v. City of Glasgow Bank*, 1879, 6 R. 621; *City of Glasgow Bank Liquidators*, 1880, 7 R. 1196.

<sup>17</sup> *Iverson v. Edinburgh Silk Yarn Co.*, 1846, 9 D. 1039; *Great Northern Rly. Co. v. Inglis*, 1850, 13 D. 1315; 1852, 1 Macq. 112; *Forbes v. Morison*, 1851, 14 D. 134.

<sup>18</sup> *Lord Blantyre v. Dickson*, 1885, 13 R. 116.

<sup>19</sup> *Lauderdale Peerage*, 1885, L.R. 10 App. Cas. 692.

the kingdom at large,<sup>1</sup> but is inadmissible in regard to matters not of a public or general nature.<sup>2</sup> A county history has been rejected as evidence of boundaries.<sup>3</sup> In matters of ancient date, histories and chronicles compiled at or near the time when the facts narrated occurred<sup>4</sup> are received in Scotland. What weight is to be attached to the relation depends on the credit of the writer and the character of the adverse evidence.<sup>5</sup> In such matters, private memorials are also admissible, *e.g.* entries in family bibles and church registers, old plans, inscriptions on tombstones, recitals in deeds and legal proceedings, etc., etc.<sup>6</sup> Books of science are not admissible, the proper mode of proving the matters set forth therein being by the examination of scientific witnesses.<sup>7</sup>

**911.** Maps and plans are either private estate plans or Ordnance survey maps. Ordnance survey maps are made under statutory authority,<sup>8</sup> but are not to be deemed or construed to extend to define, alter, or affect boundaries. They are used as adminicles of evidence, but may be contradicted and explained.<sup>9</sup> Private estate plans are useful for identifying the different divisions of the estate,<sup>10</sup> but are not evidence against a neighbouring proprietor.<sup>11</sup>

#### SECTION 4.—COMPETENCY OF EVIDENCE.

**912.** The competency of evidence depends on the relative evidentiary value of the different instruments of evidence. The rule is that the best evidence only is competent, secondary evidence being excluded as incompetent where the primary evidence appears to be available.

##### SUBSECTION (1).—*Evidence of Written Deeds.*

##### (i) *Extracts from Registers of Deeds, etc.*

**913.** Where the tenour of a writing is a fact in issue (*factum probandum*) the best or primary evidence thereof is the writing itself,<sup>12</sup> and secondary evidence will be excluded. But in certain cases official extracts from the records are received as equivalents. Official extracts from the Books of Council and Session, Registers of Sasines, and Sheriff

<sup>1</sup> Taylor on Evidence, s. 1785.

<sup>2</sup> *Vaux Peerage*, 1836, 5 Cl. & Fin. 526, at p. 538.

<sup>3</sup> *Evans v. Getting*, 1834, 6 C. & P. 586.

<sup>4</sup> *Crawford and Lindsay Peerage*, 1848, 2 H.L.C. 534.

<sup>5</sup> Stair, iv. 42, 16; Ersk. iv. 2, 7.

<sup>6</sup> Stair, iii. 5, 35; Ersk. iii. 8, 66; *Humphrey's case*, Swin. 173 *et seq.*; *Shrewsbury Peerage*, 1857, 7 H.L.C. 1; *Lauderdale Peerage*, 1885, L.R. 10 App. Cas. 692.

<sup>7</sup> *Lauderdale Peerage*, *supra*; Dickson, ss. 1224, 1717.

<sup>8</sup> Ordnance Survey Act, 1841 (4 & 5 Viet. c. 30).

<sup>9</sup> *Gibson v. Bonnington Refining Co.*, 1869, 7 M. 394; *Anderson v. Dickie*, 1914 S.C. 706; 1915 S.C. (H.L.) 79; *Meacher v. Blair-Oliphant*, 1913 S.C. 417.

<sup>10</sup> *Reid v. Haldane's Trs.*, 1891, 18 R. 744; *Brown v. North British Rly. Co.*, 1906, 8 F. 534.

<sup>11</sup> *Place v. Earl of Breadalbane*, 1874, 1 R. 1202.

<sup>12</sup> *Universal Stock Exchange Co. Ltd. v. Howat*, 1891, 19 R. 128.

Court Books are equivalent to the principals, except in questions of reduction on the ground of forgery. Official extracts of acts and deeds of the Court of Session and Sheriff Courts, and extracts of convictions in the High Court of Justiciary, Sheriff Criminal Court, and Magistrates' Courts are equivalent to the original acts, decrees, and sentences.

**914.** In certain other cases, extracts or official copies are received as *prima facie* evidence of the tenour of the original. Extracts from the Statutory Registers of Births, Deaths, and Marriages are *prima facie* evidence of the entry in the register.<sup>1</sup> Certificates of registration and other documents issued under the Merchant Shipping Act<sup>2</sup> are *prima facie* evidence of entries in the shipping register. Official copies from the Register of Limited Partnerships,<sup>3</sup> Register of Business Names,<sup>4</sup> and Records of English Courts<sup>5</sup> are *prima facie* evidence of the entries in these registers.

(ii) *Bankers' Books.*

**915.** Entries in bankers' books may be proved by a copy collated by an official of the bank and deponed to orally or by affidavit as *prima facie* evidence of the entry.<sup>6</sup>

(iii) *Proclamations, Orders, Regulations, and Colonial Statutes.*

**916.** The documentary Evidence Acts<sup>7</sup> make provision for procuring *prima facie* evidence of the tenour of proclamations, orders, and regulations issued by His Majesty, or by the Privy Council, or by certain departments of Government. The Evidence (Colonial Statutes) Act, 1907,<sup>8</sup> makes provision for procuring *prima facie* evidence of the tenour of Colonial Statutes.

**917.** Where the accuracy of the official copy or extract, forming *prima facie* evidence only, is challenged, the original record may be produced.<sup>9</sup> Where the original register is beyond the jurisdiction and cannot be produced, evidence of its tenour may be given by the custodier producing a collated copy.<sup>10</sup>

(iv) *Lost Writings*

**918.** Where a writing whose tenour is in issue (*factum probandum*) is lost and cannot be produced itself or by an equivalent extract or by a *prima facie* extract, it is generally necessary to set it up by an action of proving the tenour in the Court of Session.<sup>11</sup> Where it is founded on by way of exception only, its tenour may be proved incidentally.<sup>12</sup>

<sup>1</sup> 17 & 18 Vict. c. 80, s. 58; 10 Edw. VII. & 1 Geo. V. c. 32, s. 1.

<sup>2</sup> 57 & 58 Vict. c. 60; see also *Bell v. Gow*, 1862, 1 M. 183.

<sup>3</sup> 7 Edw. VII. c. 24, s. 16.

<sup>5</sup> *Steven v. Myer*, 1868, 6 M. 370 and 885.

<sup>7</sup> 31 & 32 Vict. c. 37; 45 Vict. c. 9; and 58 Vict. c. 9.

<sup>9</sup> 42 Vict. c. 11, s. 6; A.S., 16th July 1859.

<sup>10</sup> *Mailand v. Mailand*, 1885, 12 R. 899.

<sup>11</sup> *Shaw v. Shaw's Trs.*, 1876, 3 R. 813; *Gilchrist v. Morrison*, 1891, 18 R. 599; *Walker v. Nisbet*, 1915 S.C. 639.

<sup>12</sup> *Wilson v. Leckie*, 1870, 7 S.L.R. 563.

<sup>4</sup> 6 & 7 Geo. V. c. 58, s. 25.

<sup>6</sup> 42 Vict. c. 11.

<sup>8</sup> 7 Edw. VII. c. 16.



Where it has been lost or destroyed in the hands of the opposite party its tenour may be proved incidentally.<sup>1</sup> Where the writing is not merely *factum probandum*, but is also essential to the constitution of a right founded on, its tenour must always be set up by a substantive action of proving the tenour whether or not it is lost in the hands of the opposite party.<sup>2</sup>

**919.** Where the tenour of a writing is not itself in issue but is used *in modum probationis*, the writing or an equivalent extract, or an extract which is *prima facie* evidence of it, must be produced if available. If not available, its tenour may be proved incidentally by oral evidence, in the following circumstances:—

(1) Where the party founding on the writing *in modum probationis* is the custodier he must prove the circumstances in which the document came to be lost as a condition of the competency of leading oral evidence of its contents.<sup>3</sup>

(2) Where the party against whom the writing is to be used *in modum probationis* admits its loss in his custody his opponent may lead oral evidence of its tenour.<sup>4</sup>

(3) Where the writing to be used *in modum probationis* is in the hands of a third party its recovery must be sought by diligence, and its discovery refused, as a condition of the competency of oral evidence of its tenour.<sup>5</sup>

#### SUBSECTION (2).—*Evidence Extrinsic of Written Deeds.*

**920.** Where a writing has been produced in evidence it may, as matter of legal construction, be conclusive of the facts it purports to regulate so as to make contrary, interpretative, or modifying evidence incompetent.

##### (i) *Contrary Evidence.*

**921.** A writing which is essential to the constitution of the right founded on in action or defence excludes all contrary evidence until it has been reduced in a substantive action of reduction.<sup>6</sup> An instrument of infeftment in land where prescriptive possession has run is, however, exclusive of all extrinsic evidence even in an action of reduction.<sup>7</sup> A writing by which the parties have expressly or impliedly contracted that its terms shall be exclusive evidence of the rights contained in it,

<sup>1</sup> *Elliot v. Galpern*, 1927 S.C. 29; *Drummond v. Clunas Tiles and Mosaics, Ltd.*, 1909 S.C. 1049.

<sup>2</sup> *Elliot v. Galpern*, *supra*, per Lord Pres. Clyde; *Maxwell v. Reid*, 1863, 1 M. 932, per Lord Pres. McNeill.

<sup>3</sup> *Steel v. Law*, 1895, 3 S.L.T. 190.

<sup>4</sup> *Young v. Thomson*, 1909 S.C. 529.

<sup>5</sup> *Dowgray v. Gilmour*, 1907 S.C. 715; *M'Intosh v. Chalmers*, 1883, 11 R. 8, per Lord Kinnear at p. 12.

<sup>6</sup> *Robb's Trs. v. Robb*, 1872, 10 M. 692; *Stewart's Trs. v. Hart*, 1875, 3 R. 192; *Robertson's Trs. v. Lindsay*, 1873, 1 R. 323; *Edinburgh United Breweries, Ltd. v. Molleson*, 1894, 21 R. (H.L.) 10, per Lord Watson at p. 16.

<sup>7</sup> *Cooper Scott v. Gill Scott*, 1924 S.C. 309.

also, while unreduced, excludes contrary evidence as incompetent.<sup>1</sup> If not essential by law to the constitution of the right, it may, however, be set aside *ope exceptionis* to the effect of admitting contrary evidence as competent.<sup>2</sup> Where a writing is admitted by all parties to be inaccurate, evidence may be led *de plano* of the true state of the facts, though in contradiction of the writing.<sup>3</sup>

(ii) *Interpretative Evidence.*

**922.** Parties are bound by probative and privileged writings according to their tenour and construction by the Court, and extrinsic evidence of the granter's intention is incompetent.<sup>4</sup> Extrinsic evidence, however, may be competent in many circumstances to elucidate the application of the writing. Extrinsic evidence is competent to define what writings were intended to apply in any given circumstances,<sup>5</sup> or with what intention they were uttered.<sup>6</sup>

**923.** Where the writing shews that its terms were not intended to be exhaustive evidence of the whole transaction, extrinsic evidence will be admitted to complete the proof of the transaction, as may happen in the case of (1) a disposition bearing *in gremio* to be in implement of a decree-arbitral,<sup>7</sup> or minute of sale;<sup>8</sup> (2) written missives following on a verbal contract;<sup>9</sup> (3) a written contract executed by an agent for another;<sup>10</sup> (4) a written assignation in favour of one person who was mandatory for another;<sup>11</sup> (5) a document obliging a plurality of persons without defining their rights of relief *inter se*;<sup>12</sup> (6) a bill of exchange granted as part of a larger transaction.<sup>13</sup> But a formal writing,

<sup>1</sup> *Müller & Co. v. Weber & Schaer*, 1901, 3 F. 401.

<sup>2</sup> *Oswald v. Fairs*, 1911 S.C. 257.

<sup>3</sup> *Grant's Trs. v. Morison*, 1875, 2 R. 377; *Grant v. Mackenzie*, 1899, 1 F. 889; *Miller v. Miller*, 1905, 12 S.L.T. 743.

<sup>4</sup> *Laing v. Provincial Homes Investment Co.*, 1909 S.C. 812; *Colvin v. Hutchison*, 1885, 12 R. 947.

<sup>5</sup> *Claddagh Steamship Co. v. Steven & Co.*, 1919 S.C. (H.L.) 132; *Wilson v. Hovell*, 1924 S.C. 1; *Young's Trs. v. Henderson*, 1925 S.C. 749.

<sup>6</sup> *Forster v. Forster*, 1872, 10 M. (H.L.) 68; *Imrie v. Imrie*, 1891, 19 R. 185; *Gavin's Trs. v. Fraser*, 1920 S.C. 674.

<sup>7</sup> *Duke of Fife v. Great North of Scotland Rly. Co.*, 1899, 3 F. (H.L.) 2.

<sup>8</sup> *Lee v. Alexander*, 1882, 10 R. 230; 10 R. (H.L.) 91.

<sup>9</sup> *Ireland & Sons v. Rosewell Gas Coal Co.*, 1900, 37 S.L.R. 521; *Field v. Thomson & Co.*, 1902, 10 S.L.T. 261; *Morrow & Fell v. Hutchison*, 1873, 34 Sc. Jur. 334; *Renison v. Bryce*, 1898, 25 R. 521; *Miller v. Wilson*, 1919, 1 S.L.T. 223; *Croudace v. Annandale Steamship Co.*, 1925 S.N. 68.

<sup>10</sup> *Dickson v. Bell*, 1899, 36 S.L.R. 347; *Renton's Trs. v. Alison*, 1876, 3 R. 1142; *Welsh's Trs. v. Forbes*, 1885, 12 R. 851; *Lindsay v. Craig*, 1919 S.C. 139.

<sup>11</sup> *Cairns v. Davidson*, 1913 S.C. 1054; *Robertson's Trs. v. Riddell*, 1911 S.C. 14; *Forrester v. Robson's Trs.*, 1875, 2 R. 755.

<sup>12</sup> *Moore v. Dempster's Trs.*, 1879, 6 R. 930; *Hamilton & Co. v. Freeth & Co.*, 1889, 16 R. 1022; *Thom's Trs. v. Young*, 1910 S.C. 588; *Gordon's Trs. v. Young*, 1909, 1 S.L.T. 202; *M'Phersons v. Haggarts*, 1881, 9 R. 306.

<sup>13</sup> 45 & 46 Vict. c. 61, s. 100; *Semple v. Kyle*, 1902, 4 F. 421; *Viani & Co. v. Gunn & Co.*, 1904, 6 F. 989; *Adam's Trs. v. Young*, 1905, 13 S.L.T. 113; *Manchester & Liverpool Bank v. Ferguson*, 1905, 7 F. 865; *Stagg & Robson, Ltd. v. Stirling*, 1908 S.C. 675; *M'Allister v. M'Gallagley*, 1911 S.C. 112; *Gibson's Trs. v. Galloway*, 1896, 23 R. 414; *Dryburgh & Co. v. Roy*, 1903, 5 F. 665; *Harker v. Pottage*, 1909, 1 S.L.T. 155.

complete in its own terms so as to be exhaustive of the transaction to which it relates, excludes extrinsic evidence of additional terms not incorporated in it.<sup>1</sup>

**924.** Extrinsic evidence is also competent to explain the circumstances to which a deed applies where its terms are ambiguous in themselves<sup>2</sup> or equivocal in their application to the actual facts.<sup>3</sup> Where trade or technical terms are used they may be regarded as either ambiguous in themselves or as equivocal in relation to the facts, and extrinsic evidence is competent to elucidate their special signification in the trade or technique.<sup>4</sup>

**925.** The Court in the exercise of its *nobile officium* may admit extrinsic evidence to correct errors.<sup>5</sup>

### (iii) *Modifying Evidence.*

**926.** As a general rule the modification or discharge of a written obligation requires to be in writing, and oral evidence of it is excluded as incompetent. A verbal agreement to modify the terms of a written contract cannot competently be proved;<sup>6</sup> but an independent verbal contract between the same parties may be proved.<sup>7</sup> It is also competent to prove that the terms of a written contract have been departed from by both parties, or that, having been departed from by one party, a new relationship has been acquiesced in by the other party.<sup>8</sup>

### SUBSECTION (3).—*Evidence of Hearsay.*

**927.** Where the subject-matter of an extra-judicial statement is to be tendered in evidence *in modum probationis* the best evidence rule requires that the subject-matter should be deposed to by the originator of the statement, speaking as a witness on oath and subject to cross-examination. Evidence of the facts contained in a statement, when tendered otherwise than by the testimony of the maker of the statement, is generally incompetent on the ground that it is hearsay in

<sup>1</sup> *Stewart v. Clark*, 1871, 9 M. 616; *Largue v. Urquhart*, 1881, 18 S.L.R. 491.

<sup>2</sup> *Welwood's Trs. v. Mungall*, 1921 S.C. 911; *Hunter v. Barron's Trs.*, 1886, 13 R. 883; *Lord Advocate v. Sinclair*, 1867, 5 M. (H.L.) 97; *Blackstock v. Macarthur & Kirk*, 1919 S.C. 57.

<sup>3</sup> *Nasmyth's Trs. v. National Society for Prevention of Cruelty to Children*, 1914 S.C. (H.L.) 76; *Macdonald v. Newell*, 1898, 1 F. 68; *Brown v. North British Ry. Co.*, 1906, 8 F. 534; *Houldsworth v. Gordon Cumming*, 1909 S.C. 1198; *Keiller v. Thomson's Exr.*, 3 S. 396, 4 S. 724.

<sup>4</sup> *Hunter v. Miller*, 1862, 24 D. 1011; *Fleming & Co. v. Airdrie Iron Co.*, 1882, 9 R. 473; *Dryer v. Birrell*, 11 R. (H.L.) 41; *Sutton & Co. v. Ciceri & Co.*, 1889, 16 R. 814.

<sup>5</sup> *Caldwell Petr.*, 1871, 10 M. 99; *Krupp v. John Menzies, Ltd.*, 1907 S.C. 903.

<sup>6</sup> *Barr's Trs. v. Barr & Shearer*, 1886, 13 R. 1055; *Turnbull v. Oliver*, 1891, 19 R. 154; *Hamilton & Baird v. Lewis*, 1893, 21 R. 120; *M'Allister v. M'Gallagley*, 1911 S.C. 112.

<sup>7</sup> *Garden v. Lord Aberdeen*, 1892, 20 R. 896; *M'Elroy & Sons v. Tharsis Sulphur and Copper Co.*, 1877, 5 R. (H.L.) 171.

<sup>8</sup> *Wark v. Bargaddie Coal Co.*, 1859, 21 D. (H.L.) 1; 3 Macq. 467; *Sutherland v. Montrose Shipbuilding Co.*, 1860, 22 D. 665; *Kirkpatrick v. Allanshaw Coal Co.*, 1880, 8 R. 327.



the mouth of the witness.<sup>1</sup> This rule does not apply where the making of the statement, apart from its truth, is itself part of the *res gestæ*, or is relevant thereto, or is relevant to the credibility of a witness.<sup>2</sup> Where the person making the statement is adduced to depone to it on oath as a witness, the persons to whom it was made may also depone to the statement if it is relevant as explaining their knowledge and actings, but subject to control by the Court as to the extent to which such statement may be repeated in jury trials. The truth of the statement rests only upon the evidence of the witness who made it.<sup>3</sup>

**928.** Where the maker of the statement is dead,<sup>4</sup> hopelessly insane,<sup>5</sup> or a prisoner in enemy territory,<sup>6</sup> but not where he is merely absent or otherwise not at the moment available,<sup>7</sup> secondary evidence of the truth of the statement may competently be given by the hearsay evidence of a witness to whom the statement was made. Such secondary evidence may also competently be given by writings uttered,<sup>8</sup> but not by un-uttered writings.<sup>9</sup>

**929.** Where the maker of the statement or writing would not have been a competent witness at the date of making the statement or uttering the writing, but would, by reason of an intervening change in the general law, have been a competent witness at the date when it is tendered as evidence, its competency is perhaps doubtful.<sup>10</sup> Where the statement or writing was made with a view to preparing for, or providing hearsay evidence in, a future action it will be excluded as incompetent,<sup>11</sup> but where it was made or uttered regularly as a formal dying declaration before a magistrate or as evidence in a depending process it may competently be proved as hearsay.<sup>12</sup>

**930.** It is a moot point whether double hearsay is competent evidence.<sup>13</sup> Where, however, it has not been handed down as an isolated or casual statement, but as part of a well-established tradition or repute in the mouths of persons specially qualified to know and hear the true

<sup>1</sup> *Cockett v. Beattie*, 1897, 24 R. (J.) 62; *Dampskibsselskabet Svendborg v. Love & Stewart*, 1916 S.C. (H.L.) 187.

<sup>2</sup> See Relevancy of Evidence, paras. 847 *et seq.*, *supra*.

<sup>3</sup> *Gilmour v. Hansen*, 1920 S.C. 598.

<sup>4</sup> *Ewing v. Earl of Mar*, 1851, 14 D. 314; *Mackersy v. St. Giles Cathedral Board*, 1904, 12 S.L.T. 96; *Mackison v. Dundee Town Council*, 1910 S.C. (H.L.) 27.

<sup>5</sup> *H.M. Advocate v. Monson*, 1893, 21 R. (J.) 5; per Lord Justice-Clerk at p. 10.

<sup>6</sup> *Creditors of Cleland*, 1708, Mor. 12634.

<sup>7</sup> *Glyn v. Johnson & Co.*, 1834, 13 S. 126; *H.M. Advocate v. M'Connell*, 1887, 1 White 412; *H.M. Advocate v. Monson*, *supra*.

<sup>8</sup> *Lauderdale Peerage case*, 1885, 10 L.R. (H.L.) 692.

<sup>9</sup> *Smith*, 1857, 2 Irv. 641; *Livingston v. Murrays*, 1831, 9 S. 757; *Livingston v. Dinwoodie*, 1860, 22 D. 1333.

<sup>10</sup> *Deans Judicial Factor v. Deans*, 1912 S.C. 441; *Dysart Peerage case*, 1881, L.R. 6 App. Cas. 489.

<sup>11</sup> *Macdonald v. Union Bank*, 1864, 2 M. 963; *Graham v. Western Bank*, 1865, 3 M. 617; *Stevenson v. Stevenson*, 1893, 31 S.L.R. 129; *Robertson v. Robertson*, 1894, 2 S.L.T. 354.

<sup>12</sup> *Geils v. Geils*, 1855, 17 D. 397; *Robertson v. Robertson*, 1894, 2 S.L.T. 353; *Coutes v. Weir*, 1914, 2 S.L.T. 86; *Cullen's Trs. v. Johnston*, 1865, 3 M. 935; *Cairns v. Marianski*, 1850, 12 D. 1286; *Craig & Sons v. Glen & Sons*, 1927 S.N. 35.

<sup>13</sup> *Loat Peerage case*, 1885, L.R. 10 App. Cas. 763.

facts, there is no set limit to the number of repetitions permissible in regard to matters of pedigree or family usage.<sup>1</sup>

#### SECTION 5.—PRIVILEGE.

**931.** Evidence, though relevant and competent, may be excluded on the ground of privilege. There are four kinds of privilege, viz. (1) privilege of the party litigant, (2) privilege of the witness or haver, (3) privilege of the subject-matter of evidence, and (4) privilege of office.

##### SUBSECTION (1).—*Privilege of Party.*

###### (i) *Confidentiality.*

**932.** Communications passing between co-parties in the preparation of the action or defence are privileged against disclosure when the plea of privilege is stated by one of the parties to the communication.<sup>2</sup> But communications *ante litem motam* forming the ground of action are not privileged.<sup>3</sup> Communications passing between a party and his law agent,<sup>4</sup> or any other agent necessarily employed<sup>5</sup> in the preparation of the action or defence,<sup>6</sup> are similarly privileged from disclosure when the plea of privilege is stated by the party. But communications *ante litem motam* may not be privileged if they were made in the ordinary course of a business transaction relating to the facts in issue,<sup>7</sup> or were made in circumstances implying the agent's privity to fraud committed by the party,<sup>8</sup> or were made in concealment of the true status of an individual as related to the party.<sup>9</sup> The privilege does not apply where the *de quo queritur* is the existence of the agency,<sup>10</sup> and it may be waived by the principal expressly or by implication.<sup>11</sup>

###### (ii) *Unuttered Writings.*

**933.** The unuttered writing of an individual is not competent evidence.<sup>12</sup> In the case of corporations which can only act by their

<sup>1</sup> *Macpherson v. Reid's Trs.*, 1876, 4 R. 133; 1877, 4 R. (H.L.) 87; *Alexander v. Officers of State*, 1868, 6 M. (H.L.) 54; *M'Douall v. Lord Advocate*, 1873, 11 M. 688; 1875, 2 R. (H.L.) 49; *Wallace v. Ross*, 1891, 19 R. 233; *Deans Judicial Factor v. Deans*, 1912 S.C. 441.

<sup>2</sup> *Rose v. Medical Invalid Insurance Society*, 1847, 10 D. 156; *Logan v. Miller*, 1920, 1 S.L.T. 211; *Tannett Walker & Co. v. Hannay & Son*, 1873, 11 M. 931.

<sup>3</sup> *Rattray v. Rattray*, 1897, 25 R. 315; *Somervell v. Somervell*, 1900, 8 S.L.T. 84.

<sup>4</sup> *Earl of Morton v. Fleming*, 1921, 1 S.L.T. 205; *Wilson v. Glasgow and South-Western Rly. Co.*, 1851, 14 D. 1; *Munro v. Fraser*, 1858, 21 D. 103.

<sup>5</sup> *Wark v. Bargaddie Coal Co.*, 1855, 17 D. 526; *Caledonian Rly. Co. v. Symington*, 1913 S.C. 885.

<sup>6</sup> *Gavin v. Montgomerie*, 1830, 9 S. 213; *Hay v. Edinburgh and Glasgow Bank*, 1858, 20 D. 701; *M'Cowan v. Wright*, 1852, 15 D. 229.

<sup>7</sup> *Kid v. Bunyan*, 1842, 5 D. 193; *M'Cowan v. Wright*, *supra*.

<sup>8</sup> *M'Lean*, 1838, 2 Swin. 183; *M'Cowan v. Wright*, 1853, 15 D. 494; *Munro v. Fraser*, *supra*.  
<sup>9</sup> *Mackenzie v. Mackenzie's Trs.*, 1916, 53 S.L.R. 219.

<sup>10</sup> *A. B. v. Binny*, 1856, 20 D. 1058; *Fraser v. Malloch*, 1895, 3 S.L.T. 211; *Harvey v. Glasgow Corporation*, 1915 S.C. 600.

<sup>11</sup> 15 Vict. c. 27, s. 1.

<sup>12</sup> *Livingston v. Murrays*, 1831, 9 S. 757.

officials the question whether a writing has been uttered depends on whether it was an ordinary domestic writing within the corporation or whether it partook of the nature of a report regarding an occurrence *dehors* the ordinary domestic business of the corporation.<sup>1</sup> An ordinary domestic writing is not evidence of what the corporation did and cannot be recovered by diligence.<sup>2</sup> A report by an official of the corporation upon an inquiry into an occurrence is privileged if made *post litem motam* but is not privileged if made *ante litem motam*.<sup>3</sup>

#### SUBSECTION (2).—*Privilege of Witness.*

**934.** A witness is privileged to decline to answer questions which may tend to expose him to a criminal prosecution.<sup>4</sup> In criminal prosecutions the operation of the privilege in its application to the accused when adduced as a witness for himself is regulated by statute.<sup>5</sup>

In actions founded on adultery the privilege is extended by statute to protect the witness from questions relating to his guilt of that adultery.<sup>6</sup> In all cases the privilege may be waived by the witness, but he should be advised of the existence of the privilege where it arises.

#### SUBSECTION (3).—*Privilege of Subject-matter.*

##### (i) *Public Policy.*

**935.** The Court may refuse to compel the disclosure of information when it appears that such disclosure might in the particular case be detrimental to the public interest. The deliberations of a jury are absolutely privileged from inquiry on the ground of public policy.<sup>7</sup> Information in the hands of the criminal authorities obtained in the course of their administration of the criminal law is privileged.<sup>8</sup> In a similar position are Admiralty<sup>9</sup> and War Office<sup>10</sup> documents. Income

<sup>1</sup> *M'Bride v. Lewis*, 1922, S.L.T. 380.

<sup>2</sup> *Simcock v. Scottish Imperial Insurance Co.*, 1901, 9 S.L.T. 234; *Stuart v. Great North of Scotland Rly.*, 1896, 23 R. 1005; *Muir v. Edinburgh Tramways Co.*, 1909 S.C. 244.

<sup>3</sup> *Admiralty v. Aberdeen Steam Trawling Co.*, 1909 S.C. 335; *Finlay v. Glasgow Corporation*, 1915 S.C. 615; *Macphee v. Glasgow Corporation*, 1915 S.C. 990; *Whitehill v. Glasgow Corporation*, 1915 S.C. 1015; *M'Culloch v. Glasgow Corporation*, 1918 S.C. 155.

<sup>4</sup> *Macmillan v. Murray*, 1920 J.C. 13; *Pender*, 1836, 1 Swin. 25; *A. B. v. Binny*, 1858, 20 D. 1058.

<sup>5</sup> 61 & 62 Vict. c. 36, s. 1 (f); *Anderson v. Macfarlane*, 1899, 1 F. (J.) 36.

<sup>6</sup> 37 & 38 Vict. c. 64, s. 2; *Cook v. Cook*, 1876, 4 R. 78; *Kirkwood v. Kirkwood*, 1875, 3 R. 235; *Bannatyne v. Bannatyne*, 1886, 13 R. 619; *Hunt v. Hunt*, 1893, 1 S.L.T. 157; *M'Dougall v. M'Dougall*, 1927 S.C. 666.

<sup>7</sup> *Stewart v. Fraser*, 1830, 3 Murray 166; *Dobbie v. Johnston*, 1861, 23 D. 1139; *Pirie v. Caledonian Rly. Co.*, 1890, 17 R. 1157.

<sup>8</sup> *Little v. Smith*, 1845, 8 D. 265; *Henderson v. Robertson*, 1853, 15 D. 292; *Hastings v. Chalmers*, 1890, 18 R. 244; *Halcrow v. Shearer*, 1892, 20 R. 216; *Campbell v. Mailland*, 1893, 1 S.L.T. 127; *Arthur v. Lindsay*, 1895, 22 R. 417; *Sheridan v. Peel*, 1907 S.C. 577; *Muir v. Edinburgh Tramways Co.*, *supra*; *Mills v. Kelvin & White, Ltd.*, 1912 S.C. 995; *Hinselwood v. Auld*, 1926 J.C. 4.

<sup>9</sup> *Admiralty v. Aberdeen Steam Trawling Co.*, *supra*.

<sup>10</sup> *Cappen v. Lord Advocate*, 1919, 2 S.L.T. 266.



tax schedules,<sup>1</sup> inventories for estate duty purposes,<sup>2</sup> information supplied to the Inland Revenue by third parties;<sup>3</sup> and domestic regulations of the Inland Revenue department<sup>4</sup> are privileged, but are allowed to be recovered in special circumstances. A limited privilege is also accorded to documents belonging to the Education Department<sup>5</sup> and Commissioners of Customs.<sup>6</sup> The privilege of public policy does not appear to extend to such departments of the administration as the Board of Lunacy<sup>7</sup> and the Post Office.<sup>8</sup> Confessions by a person charged with a criminal offence may be privileged from disclosure on the ground of public policy.<sup>9</sup>

## (ii) *Public Decency.*

**936.** Communings between husband and wife *stante matrimonio* are privileged from disclosure on the ground of public decency. The privilege may be waived by the spouses jointly. It does not apply in actions between the spouses<sup>10</sup> or in public prosecutions for an offence between husband and wife.<sup>11</sup> But where a spouse is a competent witness against the will of the other only by virtue of the Evidence Acts the privilege may still be pleaded in the mouth of the witness though not in the mouth of the party.<sup>12</sup> Under the Bankruptcy Act the privilege is in certain situations wholly abrogated.<sup>13</sup>

**937.** In English law the privilege rests on the theory that husband and wife are one person. An exception is made to the rule of privilege where the action is between the spouses. But even then neither spouse may personally depone to the non-occurrence of conjugal intercourse though that fact may competently be proved *aliunde*.<sup>14</sup> The somewhat anomalous rule that a fact which is not privileged may not be deposed to by a party who is a competent and willing witness, probably owes its origin to the peculiarity of English law whereby the testimony of one spouse alone, if admitted in such a matter, would be in law sufficient proof of the fact. In view of the English rule that the evidence of one witness is sufficient proof, the admission of such testimony in the mouth of either spouse would destroy the meaning of the presumption of legitimacy arising from the maxim *pater est*. The rule of the *Russell*

<sup>1</sup> *Shaw v. Kay*, 1904, 12 S.L.T. 359, 429, 495; *Henderson v. M'Gown*, 1916 S.C. 821; *Wilson's Exrs. v. Bank of England*, 1925, S.L.T. 81.

<sup>2</sup> *Forrest v. M'Gregor*, 1913, 1 S.L.T. 372.

<sup>3</sup> *Brown v. Inland Revenue*, 1897, 35 S.L.R. 340.

<sup>4</sup> *Tiernay v. Ballingall & Son*, 1896, 23 R. 512.

<sup>5</sup> *Sturrock v. Greig*, 1849, 12 D. 166.

<sup>6</sup> *Earl v. Vass*, 1822, 1 Sh. App. 229.

<sup>7</sup> *Purves v. Gilchrist*, 1905, 13 S.L.T. 460.

<sup>8</sup> *Somervell v. Somervell*, 1900, 8 S.L.T. 112; *Forrest v. M'Gregor*, *supra*.

<sup>9</sup> *Gracie v. Stuart*, 1884, 11 R. (J.) 22, per Lord Young at p. 26. See ADMISSIONS AND CONFESSIONS, Vol. I. p. 161, *ante*.

<sup>10</sup> *Dickson*, s. 1661.

<sup>11</sup> *Millar*, 1847, Arkley 355; *Commelin*, 1836, 1 Swin. 291.

<sup>12</sup> *H.M. Advocate v. Fraser*, 1901, 3 F. (J.) 67; *Leach v. Rex*, [1912] A.C. 305, 49 S.L.R. 1032.

<sup>13</sup> 3 & 4 Geo. V. c. 20, s. 86; *Sawers v. Balgarnie*, 1858, 21 D. 153.

<sup>14</sup> *Russell v. Russell*, [1924] A.C. 687.

case has been rejected in Scotland,<sup>1</sup> and is inapplicable in a system which rejects the evidence of a single witness as insufficient proof.

#### SUBSECTION (4).—*Privilege of Office.*

**938.** Judges of the Supreme Courts are privileged to refuse to testify to matters taking place before them in their judicial capacity.<sup>2</sup> Counsel are privileged in respect that in regard to motions which they have made in Court they have the option of speaking from the Bar instead of giving evidence.<sup>3</sup> Judges of inferior Courts are not privileged to refuse to depone to matters taking place before them in their judicial capacity, but frequently inquiry into such matters is made by way of remit to the Judge to report.<sup>4</sup> No privilege is accorded to clergymen<sup>5</sup> or medical men<sup>6</sup> to refuse to depone to matters communicated to them under seal of secrecy.

#### SECTION 6.—SUFFICIENCY OF EVIDENCE.

**939.** The evidence adduced in support of a fact in issue cannot competently be acted upon unless it amounts to sufficient evidence in law. Oral evidence in order to be sufficient in law must be (1) corroborated, and (2) coherent.

#### SUBSECTION (1).—*Corroboration.*

**940.** No fact in issue (*factum probandum*) can be proved by the evidence of one witness alone, however credible he may be.<sup>7</sup> There must be some corroboration. In particular cases an exception to this rule has been introduced by statute in favour of the English rule that the evidence of one witness is sufficient if believed. These cases include The Salmon Fisheries Act, 1868,<sup>8</sup> Day Trespass Act, 1832,<sup>9</sup> Poaching Prevention Act, 1862,<sup>10</sup> Excise Management Act, 1827,<sup>11</sup> Summary Jurisdiction Act, 1908,<sup>12</sup> and Licensing (Scotland) Act, 1903.<sup>13</sup>

<sup>1</sup> *Robertson v. Robertson*, 1894, 2 S.L.T. 353.

<sup>2</sup> *Muckarsie v. Wilson*, 1824, Tait 393.

<sup>3</sup> *Curry v. Walter*, 1796, 1 Esp. 456.

<sup>4</sup> *Whyte v. Whyte*, 1895, 23 R. 320; *Monaghan*, 1844, 2 Broun 131.

<sup>5</sup> *M'Laughlin v. Douglas*, 1863, 4 Irv. 273.

<sup>6</sup> *M'Donald v. M'Donald*, 1881, 8 R. 357; *Watson v. M'Ewan*, 1905, 7 F. (H.L.) 109.

<sup>7</sup> *M'Lachlan v. Campbell & Co.*, 1822, 1 S. 274; *Dougall v. Dougall*, 1833, 11 S. 1020; *Wallace v. Ross*, 1891, 19 R. 233; *Nish v. Nish's Exr.*, 1895, 22 R. 252; *M'Caffery v. Lanarkshire Tramways Co.*, 1910 S.C. 797; *Cook v. Paxton*, 1910, 48 S.L.R. 7; *Dampskibsselskabet Svendborg v. Love & Stewart*, 1916 S.C. (H.L.) 187; *Robertson v. Robertson*, 1888, 15 R. 1001; *Wilson v. Wilson*, 1898, 25 R. 788; *Lawson v. Eddie*, 1861, 23 D. 876; *Lockwood v. Walker*, 1910 S.C. (J.) 3; *H.M. Advocate v. M'Court*, 1913 S.C. (J.) 6; *M'Dermott v. Stewart's Trs.*, 1918 J.C. 25; *Harrison v. Mackenzie*, 1923 J.C. 61; *Townsend v. Strathern*, 1923 J.C. 66.

<sup>8</sup> *Jopp v. Pirie*, 1869, 7 M. 755.

<sup>9</sup> *Lees v. Macdonald*, 1893, 20 R. (J.) 55.

<sup>10</sup> *Anderson v. Macdonald*, 1910 S.C. (J.) 65.

<sup>11</sup> *Lord Advocate v. D. & J. Nicol*, 1915 S.C. 735; *Laurence v. Ames*, 1921 J.C. 87; *Coventry v. Brown*, 1926 J.C. 20.

<sup>12</sup> *M'Dermott v. Stewart's Trs.*, *supra*.

<sup>13</sup> *Manson v. Macleod*, 1918 J.C. 60.

**941.** Any *factum probandum* may lawfully be inferred from *facta probationis*, which collectively rest on wider sources of evidence than the testimony of one witness.<sup>1</sup> A number of reciprocally relevant acts of (1) slander,<sup>2</sup> (2) adultery,<sup>3</sup> (3) assault,<sup>4</sup> or other similar acts,<sup>5</sup> each deponed to by one witness, may afford mutual corroboration of one another. But if not reciprocally relevant they cannot afford such corroboration.<sup>6</sup> The direct evidence of a single witness deponing to a fact in issue may be corroborated by the surrounding facts and circumstances, even though these would not in themselves raise an inference of fact in favour of such fact in issue.<sup>7</sup> It is not necessary that there should be independent corroboration of every element of a fact in issue, provided there be corroboration of the fact as a whole.<sup>8</sup> The evidence of the child-victim of an offence has been held to be sufficiently corroborated by evidence of the child's own statement made *de recenti*.<sup>9</sup>

#### SUBSECTION (2).—*Coherence.*

**942.** In cases where, at common law, corroboration is essential, the evidence adduced in support of a fact in issue will be insufficient in law if the witnesses adduced in support of it are fundamentally self-contradictory.<sup>10</sup> It has been held, in a case in which the English rule of one credible witness applied, that the Court might disregard the evidence as a whole,<sup>11</sup> but this decision is of doubtful authority.

### SECTION 7.—PROOF.

**943.** Where evidence sufficient in law has been led, it may succeed or may fail in convincing the judge or jury of the truth of the facts in issue. The judge of the facts is bound to decide according to the weight of the evidence.

#### SUBSECTION (1).—*Burden of Proof.*

**944.** The rule is that the party asserting a fact is bound to prove it, and the party who denies the fact is not bound to disprove it. But where an omission to do something is an essential prerequisite to a right of action or to a defence, the party asserting the omission may be

<sup>1</sup> *Ferrier v. Sandeman*, 1809, 15 F.C. 373.

<sup>2</sup> *Ramsay v. Nairne*, 1833, 11 S. 1033; *M'Vicar v. Barbour*, 1916 S.C. 567.

<sup>3</sup> *Murray v. Murray*, 1847, 9 D. 1556; *Walker v. Walker*, 1871, 9 M. 1091; *Dombrowitzki v. Dombrowitzki*, 1895, 22 R. 906.

<sup>4</sup> *H.M. Advocate v. Bickerstaff*, 1920 J.C. 65, at p. 82.

<sup>5</sup> *Ritchie v. Murray*, 1841, 2 Swin. 581; *H.M. Advocate v. Rae*, 1888, 15 R. (J.) 80; *H.M. Advocate v. M'Dermott*, 1883, 21 S.L.R. 265; *Gallagher v. Paton*, 1909 S.C. (J.) 50; *H.M. Advocate v. Heron*, 1914 S.C. (J.) 7.

<sup>6</sup> *Oswald v. Fairs*, 1911 S.C. 257.

<sup>7</sup> *Petrie v. Petrie*, 1911 S.C. 360; *Bennet Clark v. Bennet Clark*, 1909 S.C. 591.

<sup>8</sup> *Scott v. Jameson*, 1914 S.C. (J.) 187; *M'Ninch v. Auld*, 1921 J.C. 13.

<sup>9</sup> *M'Lennan v. H.M. Advocate*, 1928, S.N. 54.

<sup>10</sup> *Sim v. Miles*, 1834, 12 S. 633; *M'Ghee v. Glasgow Coal Co.*, 1923 S.C. 293.

<sup>11</sup> *Coventry v. Brown*, 1926 J.C. 20 (Lord Justice-General dissenting).



bound to prove the omission. Thus, where a pursuer asserts injury through a defender's failure to take care, he is bound to prove the failure to take care as well as the injury,<sup>1</sup> unless the injury is one which does not ordinarily happen without fault on the part of the defender.<sup>2</sup> So, too, where a pursuer asserts a fact and its non-disclosure by the defender, he is bound to prove the non-disclosure as well as the fact.<sup>3</sup> The interlocutor allowing inquiry may place a special burden on the pursuer of the issue by compelling him to lead a proof *scripto*. The considerations upon which the imposition of such special *onus* proceeds are matters within the province of substantive law rather than the law of evidence.<sup>4</sup>

#### SUBSECTION (2).—*Weight of the Evidence.*

**945.** As a general rule the weight of the evidence must be commensurate with the weight of the burden of proof; and where there is a special *onus* to lead a proof *scripto* it cannot competently be discharged by oral evidence.

**946.** While in general the party founding on a negative must lead some evidence in support of it,<sup>5</sup> he is not put to a strict proof of it. In reductions on the head of minority and lesion it has been said that non-age may be proved by evidence not strictly legal, called an *aliqualis probatio*.<sup>6</sup> Where the negative is something peculiarly within the knowledge of the opposite party very slight evidence of it may be sufficient to throw the *onus* of proof on to that party, the facts being proper to his knowledge.

#### SUBSECTION (3).—*Oath of Party.*

**947.** "There are three ordinary ways of proving points admitted to be proved in acts of litiscontestation or acts before answer, viz. writ, witnesses, or oath of party; of which two, and sometimes all, may concur for proving the same point."<sup>7</sup> The method of proof by the oath on reference of a party has never been regarded as being in the category of judicial evidence,<sup>8</sup> and, being very special, it is dealt with separately *infra*.<sup>9</sup> Under the older practice, when the parties litigant

<sup>1</sup> *Alexander v. Phillip*, 1899, 1 F. 985; *Macfarlane v. Thomson*, 1884, 12 R. 232.

<sup>2</sup> *Ballard v. North British Rly. Co.*, 1923 S.C. (H.L.) 43.

<sup>3</sup> *M'Clure, Naismith, Brodie & Macfarlane v. Stuart*, 1887, 15 R. (H.L.) 1.

<sup>4</sup> *Simpson v. Stuart*, 1875, 2 R. 673; *Kerr's Trs. v. Kerr*, 1883, 11 R. 108. (Where a person is alive and available as a witness the law of evidence would prefer his direct oral testimony, given on oath and subject to cross-examination, as being better evidence than his unsworn informal writ containing his indirect statement not subject to cross-examination. But the substantive law applicable to the right involved in the action may in certain cases invert the ordinary rule of evidence—cf. *Lindsay v. Lindsay*, 1927 S.C. 395.)

<sup>5</sup> *Dalziel School Board v. Scotch Education Department*, 1915 S.C. 234.

<sup>6</sup> *Ersk. Inst.* i. 7, 36.

<sup>7</sup> *Stair, Inst.* iv. 42, 1; see also *Ersk. Inst.* iv. 2, 1; and *Bell's Prin.*, s. 2205.

<sup>8</sup> *Adam v. MacLachlan*, 1847, 9 D. 576; *Longworth v. Yelverton*, 1867, 5 M. (H.L.) 144.

<sup>9</sup> See OATH ON REFERENCE.

were incompetent to give evidence as witnesses, a number of rules were introduced partly with a view of rejecting frivolous suits and partly with a view of obviating frivolous defences. Under these rules the party might be examined judicially, or upon one or other of certain special oaths which, though unusual in modern practice, are still competent and, where resorted to, have some features different from evidence given by the party as a witness.

#### SUBSECTION (4).—*Oath of Calumny.*

**948.** In earlier practice either party against whom an averment had been made and found relevant in a civil cause might be required by the party making the averment to depone on oath whether he knew the averment against him to be true.<sup>1</sup> In modern practice this rule has been replaced by the rule requiring parties to answer the averments made against them by means of written pleadings.<sup>2</sup> This oath of calumny, while not incompetent, is not used in modern practice.<sup>3</sup> Another form of oath of calumny was prescribed by the Commissary Court in consistorial causes to prevent collusion. In it the pursuer depones that he believes his own averments to be true and that there is no concert or collusion between the parties in raising the action. This oath of calumny is still required from a pursuer, but only in actions of divorce.<sup>4</sup>

#### SUBSECTION (5).—*Judicial Examination.*

**949.** The Court formerly allowed, and may still allow, a party to examine his opponent upon the facts of the case generally in cases where there is likely to be *penuria testium*.<sup>5</sup> Such an examination requires to be specially moved for and is within the discretion of the Court to allow or refuse. It is not taken upon oath, and only an actual party to the cause may be examined. The examination will not be allowed as to a matter provable only by writ or oath,<sup>6</sup> but it has been allowed in supplement of proof *scripto* to explain the terms of a latent trust.<sup>7</sup> Admissions made by a party on judicial examination are not final and binding as judicial admissions or admissions made upon oath as a witness.<sup>8</sup> As to matters inferring crime, a party may be judicially examined unless he objects,<sup>9</sup> provided the question arises in a civil action.<sup>10</sup> In proper criminal prosecutions the prisoner on being charged

<sup>1</sup> Act 1429, c. 125; A.S., 13th January 1692.

<sup>2</sup> A.S., 1st February 1715, s. 6; A.S., 11th February 1828, s. 105; and Sheriff Court Act, 1907 (7 Edw. VII. c. 51), rule 44.

<sup>3</sup> *Paul v. Laing*, 1855, 17 D. 604.

<sup>4</sup> Court of Session Act, 1830 (11 Geo. IV. and Will. IV. c. 69), s. 36.

<sup>5</sup> *M'Kellar v. Scott*, 1862, 24 D. 499.

<sup>6</sup> *M'Master v. Brown*, 1829, 7 S. 337; *Alcock v. Easson*, 1842, 5 D. 356.

<sup>7</sup> *Muir v. Gemmel*, 1805, Hume, Dec. 342.

<sup>8</sup> *Wilson v. Beveridge*, 1830, 10 S. 110.

<sup>9</sup> *Livingston v. Murrays*, 1831, 3 Deas & And. 627.

<sup>10</sup> *Duncan v. Ramsay*, 1853, 1 Irv. 208; *Mackay v. Ross*, 1853, 2 Irv. 288.

is examined on declaration before a magistrate, but may refuse to make any statement.<sup>1</sup>

SUBSECTION (6).—*Oath in Supplement.*

**950.** It was formerly the practice, and is still competent, for the Court to allow the pursuer to complete the proof by tendering an oath in supplement where he has led a *sempilena probatio* of the facts in issue by other sources of evidence. The oath was only allowed where there was *penuria testium*, and in practice was almost wholly confined to two classes of cases, viz. (1) in actions for the price of merchandise sold during a course of dealing between the parties, and (2) in actions of affiliation and aliment. A *sempilena probatio* was something less than full proof and something more than mere suspicion, and has generally been described as that amount of evidence which, if corroborated by the evidence of an interested witness, would prove the libel.<sup>2</sup> As the pursuer is a competent witness in these actions it is not now the practice to allow an oath in supplement.

SUBSECTION (7).—*Oath in Litem.*

**951.** This oath was allowed by the Court to the pursuer in actions for damages to property on the ground of fault, where fault and loss arising therefrom had been established by evidence *aliunde*. It was originally appropriate to cases of spuilzie, and though extended to cases of negligence, to cases of vicarious responsibility, and to cases under the edict *nautæ, caupones, stabularii*, it appears to have been generally excluded wherever delict or *quasi delict* had not been established.<sup>3</sup> The oath was admitted only to prove the extent of the loss. The oath *in litem* is still competent, and as it has a stronger effect than the testimony of the pursuer as a witness, its usefulness cannot be said to have been superseded by the statutes admitting party witnesses. The oath *in litem*, if believed, is in itself conclusive of the enumeration, description, and value of the lost property, without further corroboration.<sup>4</sup>

<sup>1</sup> See Crime (Procedure) Vol. V. p. 209, *ante*.

<sup>2</sup> *M'Laren v. M'Culloch*, 1844, 6 D. 1133.

<sup>3</sup> *Coupar v. Pitligo*, 1662, Mor. 5626.

<sup>4</sup> *Douglas v. Walker*, 1825, 3 S. 534; *Scott v. Gillespie*, 1827, 5 S. 669; *Gowans v. Thomson*, 1844, 6 D. 606.



## EX DELIBERATIONE DOMI- NORUM CONCILII.

*See* BILL CHAMBER.

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## EXAMINATION OF BANKRUPT.

*See* SEQUESTRATION.

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## EXAMINATION OF WITNESS.

*See* WITNESS.

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## EXAMINATION, JUDICIAL.

*See* CRIME (PROCEDURE): EVIDENCE.

# EXCAMBION.

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### SECTION 1.—INTRODUCTORY.

**952.** Excambion is that legal contract by which lands belonging to one proprietor are exchanged for other lands belonging to a different proprietor. It is as applicable to urban as to rural properties. In the latter case it is most commonly employed when it is desired to straighten boundaries, and in the former case it is frequently met with when alterations in accesses are required. Where the lands or subjects to be excambed are of unequal value, a monetary consideration is given to equalise the exchange. In its bilateral form, which is that usually adopted, the contract has been devised in order to save the necessity for separate conveyances. Excambion by separate unilateral deeds is, however, equally valid, though rarely employed.

**953.** Elaborate provisions are made in the Entail Acts for effecting excambions which have no application to excambions by fee-simple proprietors, and it will be convenient to treat the subject under separate heads.

### SECTION 2.—EXCAMBION OF FEE-SIMPLE PROPERTIES.

#### SUBSECTION (1).—*Form of Contract.*

**954.** So far as fee-simple properties are concerned the form of contract has always been perfectly simple. After a brief narrative of the proposed arrangement, the first party disposes to the second party the strip or piece of ground he is giving—the ordinary form of disposition with the usual executive clauses being used; while the second party, on the other hand, disposes in the same way to the first party the portion of ground he is transferring in exchange. It is useful to attach a plan showing the several lands or subjects differently coloured. The deed is recorded for preservation as well as for publication, and two extracts obtained, copies of the plan (if any) being kept and put up

with each extract. It is assumed that at the date of the excambion both properties are unencumbered. If not, the consent of the heritable creditors should, as in the case of an ordinary sale, be taken, to the effect of releasing the excambed subjects from their securities.

#### SUBSECTION (2).—*Warrandice.*

**955.** The specialty in such contracts was the warrandice. It had always been accepted as a principle of law that lands acquired or disposed in excambion were subject to mutual rights of real warrandice. Such warrandice was implied in the contract, and in virtue of it either party might, in case of eviction of the lands disposed to him under the contract, recover possession of the lands given by him in exchange therefor. Further, this warrandice-right was transmitted to the heirs and singular successors of the original parties to the contract, and might be enforced even against a singular successor who acquired right prior to the eviction of the party founding on this implied warrandice. It was, however, essential, in order to the exercise of this right of recurrence to the original property in case of eviction, that the deed or deeds should bear expressly that the lands were mutually disposed in excambion.

**956.** By a short section of the Conveyancing Act of 1924,<sup>1</sup> real warrandice rights have been abrogated, it being enacted that “from and after the commencement of this Act<sup>2</sup> it shall not be competent to dispose lands” (this does not include securities<sup>3</sup>) “in real warrandice of a conveyance of other lands, and such real warrandice shall not arise *ex lege* from any contract or agreement entered into after the commencement of the Act.” This is conclusive as regards the future, and as regards the past such rights are thus dealt with: “On the expiry of twenty years from and after the commencement of this Act, all dispositions in real warrandice of a conveyance of other lands and all such real warrandice arising *ex lege* from any contract or agreement granted or entered into prior to the commencement of the Act shall be no longer operative.” Accordingly, on 1st January 1945 all rights of real warrandice will be of avail no longer, and titles will thus be further cleared and simplified.

#### SUBSECTION (3).—*Excambion by Trustees.*

**957.** Apart from relaxations of entail provisions, excambion arrangements have not been much affected by statute. Under the Trusts Act of 1867<sup>4</sup> trustees might have obtained power from the Court, if necessary for the execution of the trust and not inconsistent with the intention thereof, “to excamb any part of the trust estate which is heritable,” or they might have been authorised by the beneficiaries to

<sup>1</sup> 14 & 15 Geo. V. c. 27, s. 14.

<sup>3</sup> Sec. 2 (1).

<sup>2</sup> 1st January 1925.

<sup>4</sup> 30 & 31 Vict. c. 97, repealed 1921.



do so. By the Trusts Act of 1921<sup>1</sup> trustees have now the above power or right, without requiring to go to the Court if the act in itself is not at variance with the terms or purposes of the trust. The section is declared retrospective except as regards actions depending at the passing of the Act.<sup>2</sup>

SUBSECTION (4).—*Proof of Contract.*

**958.** Excambions involving, as they do, a double transaction, it might be supposed that a verbal contract was not a likely event. Yet there is a reported case where it was held that a verbal contract of excambion might be proved and explained by the subsequent possession of the parties concerned.<sup>3</sup>

SUBSECTION (5).—*Burdens.*

**959.** Before passing to excambion provisions under entails, reference may be made to cases where lands held in fee-simple are exchanged for entailed lands and where there are encumbrances. By the Titles to Land Act of 1868,<sup>4</sup> which re-enacted similar provisions in an earlier Act,<sup>5</sup> it is provided as follows:—

When any lands disposed before or after the commencement of this Act under the authority of an Act of Parliament, in excambion for other lands, are burdened with debts, the lands so disposed shall, from and after the date of registration, whether before or after the commencement of this Act, in the appropriate Register of Sasines of the contract or deed of excambion of such lands, be freed and discharged of such debts so far as previously affecting the same, and shall be burdened with the debts, if any, which previously affected the lands acquired in exchange for the same, in the order of preference in which such debts were a burden upon said last-mentioned lands: Provided always, in the case of excambions after the 31st of December 1868, that before any such excambion is authorised (in addition to such procedure as may be prescribed by such Act) such intimation as the Court of Session may consider necessary shall be made to all creditors having interest, and such creditors shall be entitled to state any objections thereto, of which the Court shall judge: Provided also, that in such contract or deed of excambion, whether executed before or after the commencement of this Act, or in a schedule subscribed as relative thereto, and declared to be part thereof, and recorded therewith, there have been, or shall be, set forth as to each of the said debts the following particulars, namely, the amount of the debt, the date of recording the writ by which its constitution was originally published, the register in which the same was so published, the name and designation of the original creditor, and, if the debt has been transferred, the name and designation of the creditor understood to be in right thereof for the time, and the date of recording the writ whereby his right was published, and the register in which the same was so published: Provided further that in such contract or deed of excambion such debts have been or shall be expressly declared to burden the lands to which the same are transferred as aforesaid.

<sup>1</sup> 11 & 12 Geo. V. c. 58, s. 4.

<sup>2</sup> 19th August 1921.

<sup>3</sup> *Melville v. Wilson*, 1829, 7 S. 889; 1830, 8 S. 841.

<sup>4</sup> 31 & 32 Vict. c. 101, s. 150.

<sup>5</sup> 23 & 24 Vict. c. 143, s. 28.

**960.** The provisions of the above Act limit its application to lands disposed before or after the commencement of the Act, "under the authority of an Act of Parliament." Its object is to facilitate excambions, where either one or both of the estates dealt with are entailed and burdened with debts, and are excambed under the provisions of the Entail Acts, or of a private Act of Parliament. This statutory provision is also applicable to lands held in trust, and excambed under any statutory authority; and, in practice, it has likewise been held to apply to fee-simple lands where these are excambed for entailed lands. In order to an exchange of debts in virtue of this enactment, intimation requires to be made, under the authority of the Court of Session, to all creditors having interest (in addition to any procedure prescribed by the particular Act under which it is proposed to carry through the excambion), and such creditors may state objections thereto. As regards exchange of debts affecting the excambed lands, it will be noted that in the contract or deed of excambion such debts must, in order to make the exchange of burdens effectual, be expressly declared to burden the lands to which they are intended to be transferred. A form of clause and schedule for effecting this were appended to the article on "Excambion" in the last edition of the *Encyclopædia*, vol. V, pp. 215-236.

### SECTION 3.—EXCAMBION IN ENTAILED ESTATES.

#### SUBSECTION (1).—*Preliminary.*

**961.** The provisions of the entail statutes with reference to excambions are, in contradistinction to the legislative provisions affecting fee-simple lands, very numerous, and they extend over almost the whole period of entail legislation. But it will be well at the outset to cite the provision of the Act of 1914<sup>1</sup> regarding entails. It runs thus: "The Entail Act, 1685, shall not apply to any deed relating to land in Scotland dated after the passing of this Act,<sup>2</sup> the effect of which would be to entail such land, and no such deed shall be recorded in the Register of Entails; and any prohibition of alienation, contracting debt, or altering the order of succession, and any clause of consent to registration in the Register of Entails in any such deed shall be null and void." Although there is a proviso safeguarding arrangements which may have been made prior to the Act for the execution of an entail, the above section practically vetoes entails excepting those in existence at its passing. A testamentary direction, however, to trustees to convey a landed estate to an institute of entail and a specific series of heirs by a deed of entail is not wholly or absolutely null under the Act of 1914. They are bound to execute in favour of the institute and the named series of heirs a disposition containing all the provisions and burdens

<sup>1</sup> 4 & 5 Geo. V. c. 43, s. 2.

<sup>2</sup> 10th August 1914.

set forth in the settlement except the provisions for creating a strict entail.<sup>1</sup>

**962.** A special power to excamb lands within certain limits, or under certain conditions, or a specified portion of the estate, is of frequent occurrence in deeds of entail, and a reserved power of this nature is not inconsistent with a strict entail under the Act of 1685, c. 22, but such power must be exercised in accordance with the express conditions under which it is given,<sup>2</sup> and the whole entailed lands cannot be sold or excambed at once.<sup>3</sup>

**963.** It will be convenient in dealing with this subject of excambions as applicable to lands held under entail, where the deed of entail itself contains no enabling power, and where the excambion must therefore be carried out under the provisions of the entail statutes, to consider it in relation to

1. The Extent, Situation, and Value of the Lands which may be Excambed.
2. The other Conditions under which the Excambion may be carried through.
3. The Procedure in the Applications to the Sheriff Court or Court of Session for the requisite Authority.
4. The Recording of the Contract and Completion of the Excambion.
5. Special Points raised under Decisions.

SUBSECTION (2).—*Extent, Situation, and Value of Lands.*

**964.** The relaxation of the fetters so far as excambing is concerned is shewn in succinct form thus:

Act.	Extent restricted to
1770. <sup>4</sup>	30 acres Scots arable ( $37\frac{1}{2}$ acres imperial); or 100 acres Scots hill or untillable land (125 acres imperial).
1836. <sup>5</sup>	Not more than one-fourth in value of estate in all, and excluding mansion-house or offices, garden, park, lawn, home farm, or policy.
1848. <sup>6</sup> and 1875. <sup>7</sup>	} The entailed estate in whole or in part, with consents.
1868. <sup>8</sup>	
	Repeals 1770 figures and fixes not more than 300 acres in one place or plot.

**965.** It will be observed from these references to the entail statutes and the sections cited that, as regards the extent, situation, and value

<sup>1</sup> *Lumsden's Trs. v. Lumsden*, 1917, S.C. 579.

<sup>2</sup> *Baird v. Baird*, 1844, 6 D. 643.

<sup>4</sup> 10 Geo. III. c. 51, ss. 32 and 33.

<sup>6</sup> 11 & 12 Vict. c. 36, ss. 5 and 37; 16 & 17 Vict. c. 94, s. 5.

<sup>7</sup> 38 & 39 Vict. c. 61, s. 6.

<sup>3</sup> *Earl of Breadalbane*, 1830, 8 S. 490.

<sup>5</sup> 6 & 7 Will. IV. c. 42, ss. 3 and 4.

<sup>8</sup> 31 & 32 Vict. c. 84, ss. 14 and 18.



of lands held under entail which may be excambed, the rules now in force are as follows:—

- (a) With the necessary consent or consents, the whole or any part of the entailed estate, whether held under an entail dated prior or subsequent to 1st August 1848, may be excambed.<sup>1</sup>
- (b) Without such consent, any portion thereof may be excambed for other lands lying contiguous to the same, or to some other part of the entailed estate, or being convenient to be holden therewith; but this must not include the principal mansion-house or offices, or the garden, park, lawn, home farm, or policy, nor extend to more than one-fourth in value of the entailed estate; and where one-fourth in value of the whole estate has been excambed under the authority of this Act, no further excambions are competent.<sup>2</sup>
- (c) Without such consent, any portion of an entailed estate, not exceeding 300 acres lying together in one place, may be given in exchange for an equivalent in land, to be received in place of the land given in exchange. There is, under the provisions of the 1868 Act,<sup>3</sup> no restriction as to the quality or character, or the precise situation or value, of the land which may be made the subject of the excambion; but it will be kept in view that this is really an extension of the powers of the Act of 1770. An excambion of the surface merely, the minerals being reserved, is valid.<sup>4</sup> For certain considerations to be taken into account in estimating the value of entailed lands to be excambed, reference should be made to the case noted below.<sup>5</sup>

#### SUBSECTION (3).—*Other Conditions.*

**966.** These conditions relate to the necessity or not for including or referring in the deed of excambion to the destination, prohibitory, irritant, and other fettering clauses of the entail, the recording of the contract in the Register of Entails, the time when the consent of the next heirs could be given, the ascertainment of the value of their interest even in cases of minority and legal incapacity, and other relative provisions, in respect of some or all of which there has from time to time been modification or abrogation. The following may be taken as a working summary of those conditions still applicable to excambions falling to be carried out under the entail statutes, namely—

- (a) The destination, conditions, and prohibitory, irritant, and resolute clauses of the entail may now be incorporated in the contract, by the original deed of entail, the date thereof, and the date of recording in the Register of Entails being set forth

<sup>1</sup> 11 & 12 Vict. c. 36, s. 5; 31 & 32 Vict. c. 84, s. 18; 38 & 39 Vict. c. 61, s. 6.

<sup>2</sup> 6 & 7 Will. IV. c. 42, ss. 3 and 4.

<sup>3</sup> 31 & 32 Vict. c. 84, s. 14.

<sup>4</sup> *Hamilton v. Chancellor*, 1833, 12 S. 22.

<sup>5</sup> *Duke of Hamilton*, 1858, 20 D. 1134.

in a clause of reference, or by such reference being made to the deed of entail, or to any conveyance, instrument, or other writ recorded in the Register of Sasines, and forming part of the progress of title-deeds following on the entail.<sup>1</sup>

- (b) The contract may be recorded without the necessity of a warrant from the Court of Session, but the authority of the Court to the excambion itself is still required.<sup>2</sup>
- (c) The contract may be executed prior to the application being made to the Court, and may be produced in the course of the proceedings.<sup>3</sup>
- (d) Where the consent of subsequent heirs of entail, including the heir-apparent or other nearest heir, is required, the value of such consent may be ascertained, the amount thereof consigned in bank, and the consent dispensed with by the Court.<sup>4</sup>
- (e) Such consent may also be given by a curator *ad litem* appointed by the Court to any heir of entail in minority or under other legal disability.<sup>5</sup>
- (f) Where an excambion is to be carried out under the Rosebery Act, the application to the Court may be made by way of summary petition in the form and manner prescribed by the Rutherford Act, as amended by the Entail Act of 1875, and it is now unnecessary to adopt any of the procedure required by the Rosebery Act.<sup>6</sup>
- (g) It is now sufficient to record any contract of excambion, executed at the sight of the Court, in the Register of Entails.<sup>6</sup>

#### SUBSECTION (4).—*Procedure in Petitions.*

**967.** This has varied. Under the Montgomery Act<sup>7</sup> application had to be made to the Sheriff or Steward, who appointed two or more skilful persons to inspect and adjust the value of the lands proposed to be excambed; and upon such persons settling the marches of these lands, and reporting upon oath that the exchange would be just and equal, the Sheriff or Steward authorised the exchange to be made by a contract of excambion. Under the Rosebery Act<sup>8</sup> provision was made for proceeding by summary petition to the Court of Session after three months' previous notice to the five next heirs of entail, or the whole heirs of entail if their number should be less than five (or, *inter alios*, to their legal guardians if an heir or heirs should be under any mental or other legal disability), and the Court was authorised, after proof of this notice having been given and upon receiving a report from two or more skilful

<sup>1</sup> Entail Act, 1841, 4 & 5 Vict. c. 24, s. 1; Titles Act, 1860, re-enacted by Act of 1868, 31 & 32 Vict. c. 84, s. 9.

<sup>2</sup> 1841 Act, s. 1.

<sup>3</sup> 1853 Entail Act, 16 & 17 Vict. c. 94, s. 5.

<sup>4</sup> Entail Act, 1875, 38 & 39 Vict. c. 61, ss. 5 and 6, as amended by Entail Act of 1882, 45 & 46 Vict. c. 53, s. 13.

<sup>5</sup> 1882 Act, s. 12.

<sup>6</sup> 1848 Act, s. 37.

<sup>7</sup> 10 Geo. III. c. 51.

<sup>8</sup> 6 & 7 Will. IV. c. 42, s. 3.

persons as to the value and marches of the lands proposed to be excambed, and upon being satisfied of the respective values of such lands and of the expediency of the excambion, to give and authorise the same; and thereupon the contract of excambion was directed to be executed at the sight and with the approbation of the Court, and recorded in the Sheriff Court Books of each of the shires in which the lands or heritages to be excambed were situated, and also, within three months, in the Register of Entails.

In ascertaining the value of the interests of the next heirs of entail in the case of disentailing, a remit is similarly made by the Court to a practical man, but unless the valuator requests information or assistance from parties or their agents, this, it seems, should not be tendered.<sup>1</sup> The same abstinence, it is thought, should be observed in excambion remits.

**968.** By the Rutherford Act <sup>2</sup> the forms of procedure previously in use were modified, and it was enacted that it should be lawful for any heir of entail to make application by way of summary petition to the Court of Session, setting forth the deed of entail under which the estate was held, the counties in which it or the several estates are situated,<sup>3</sup> the date of the petitioner's infestment therein,<sup>4</sup> and the names, designations, and places of abode, so far as known to the petitioner, of the heirs-substitute whose consents were required to such petition (or, if they are under legal disability, of their tutors or other legal guardians), as also the extent and manner in which such estate was proposed to be affected. Sec. 34 relates to the intimation and advertising of the petition, but it has been virtually superseded by the provisions of the Entail Amendment Act of 1875. Sec. 35 authorises the Court to interpose its authority, and give decree authorising the petitioner to do and perform the act or acts proposed in the petition, in so far as authorised by the statute. Sec. 36 deals with the heirs of entail who require to be called as parties to the proceedings; while s. 37 relates to excambions carried through under the Rosebery Act, and the recording of any contracts executed at the sight of the Court.

**969.** The provisions, therefore, as to procedure which are now in force are those contained in the above-recited sections of the Rutherford Act as modified by the provisions of s. 12 of the Entail Amendment Act, 1875. An application for authority to excamb might formerly, in contradistinction to one to disentail, sell, alienate, dispose, or charge with debt or encumbrances, have been made and prosecuted by the tutor or curator of a pupil or minor heir, or one under legal incapacity.<sup>5</sup> But this enabling power in favour of a tutor or other legal guardian has now been extended by the Entail Act of 1882 <sup>6</sup> to all applications under the entail statutes, except one for authority to disentail.

<sup>1</sup> *A. B.*, Petr. (O.H.), 1916, 1 S.L.T. 41.

<sup>2</sup> 11 & 12 Vict. c. 36, ss. 33-37.

<sup>3</sup> *Sir J. Marjoribanks*, 1852, 14 D. 935.

<sup>4</sup> *Lord Wharnccliffe*, Petr., 1852, 24 Sc. Jur. 553, 1 Stuart, 948; *MacLaine*, 1852, 24 Sc. Jur. 545.

<sup>5</sup> Act of 1875, s. 12.

<sup>6</sup> 45 & 46 Vict. c. 53, s. 11.



That Act also makes certain special provisions with reference to the consent of an heir who is absent from Scotland or has disappeared.<sup>1</sup>

The consent of any subsequent heir under legal disability may now be given through the medium of a curator *ad litem* appointed by the Court to such heir.<sup>2</sup> Applications for authority to charge for improvement expenditure or to grant leases may be made in the Sheriff Court;<sup>3</sup> but apparently if that Court is now resorted to in any application to excamb lands, that would require to be done, so far as procedure is concerned, under the provisions of the Montgomery Act.

SUBSECTION (5).—*Completion of the Contract by Recording.*

**970.** The Montgomery Act required the contract to be recorded in the Sheriff Court Books within three months of the date of its execution, the excambion having previously been authorised by the Sheriff, but under this Act it was not necessary that the contract itself should be executed at the sight and with the approval of the Sheriff. The Rosebery Act, by which application to the Court of Session was first made competent, required the contract to be executed at the sight of the Court, and provided that thereafter it should be recorded in the Sheriff Court Books of the county in which the excambled lands were situated, and also, within three months, in the Register of Entails. The provisions of the Rosebery Act were, however, only applicable to heirs of entail in possession under tailzies made and executed pursuant to the Tailzies Act, 1685. By the Entail Act, 1838,<sup>4</sup> the powers of the Rosebery Act as to making excambions were extended to heirs in possession of entailed estates under deeds of entail which had not been recorded in terms of the Act of 1685. This Act further provided that all contracts of excambion to be executed in virtue thereof should be recorded in the Sheriff Court Books of each of the shires or stewartries in which the excambled lands were situated, and should thereupon be effectual to all intents and purposes, without the necessity of being recorded in the Register of Entails. It further enacted that, in the event of any deed of entail being recorded in the Register of Entails, after an excambion had taken place, it should be incumbent upon the person registering the entail to record at the same time in that register any contract or contracts of excambion of any part or parts of the entailed estate which had been entered into before registration of the deed of entail, and that, failing the registration of such contracts, the deed of entail, in so far as regarded any excambion carried through before the registration, should be deemed and taken to be unrecorded in the Register of Entails. This Act of 1838 was supplemented by the Entail Act, 1841,<sup>5</sup> under which the contract might be recorded in the Register of Entails without judicial warrant; and the final statutory provision on the subject is contained in the Rutherford Act,<sup>6</sup> by which it was made unnecessary

<sup>1</sup> 45 & 46 Vict. c. 53, s. 15.

<sup>2</sup> *Ibid.*, s. 12.

<sup>3</sup> *Ibid.*, s. 5.

<sup>4</sup> 1 & 2 Vict. c. 70.

<sup>5</sup> 4 & 5 Vict. c. 24.

<sup>6</sup> 11 & 12 Vict. c. 36, s. 37.

to record any contract of excambion executed at the sight and with the approval of the Court in terms of the Rosebery Act, as amended by the Rutherford Act, in any other register than the Register of Entails. This, therefore, is now the ruling provision on the subject, except where it is desired to carry through an excambion under the Montgomery Act, or in virtue of the Act of 1838 dealing with unrecorded entails, in which cases the proper and competent course is still, apparently, to record the contract in the Sheriff Court Books of the appropriate county or counties. A contract of excambion affecting an entailed estate lying in two separate counties has to be recorded in both.<sup>1</sup>

SUBSECTION (6).—*Special Points raised under Decisions.*

**971.** Two decisions of comparatively recent date affect the law of excambion, and both are of a peculiarly special and technical interest. In a parish from which a part had been disjoined and erected into a parish *quoad sacra*, and the original parish church was excambed for a new church voluntarily erected by one of the heritors, who was a fee-simple proprietor, it was held by the House of Lords, reversing the judgment of the Court of Session, that, in the absence of stipulation in the contract of excambion, the sittings fell to be allocated as in the old church.<sup>2</sup> In the other case<sup>3</sup> an heir of entail in possession obtained power to feu a part of the entailed estate in terms of a form of feu-charter approved by the Court, whereby the feuars were taken bound to "take and pay for," by way of annual assessment, a water supply provided from another portion of the entailed estate not within the limits of the feuing-ground. The feuing-ground was afterwards excambed for other lands held by the heir of entail in fee-simple, and thus became vested in the heir of entail as a fee-simple proprietor. In a question between a succeeding heir of entail and the successor in the fee-simple estate of superiority of the feus, it was held (1) that the feu-charters granted before the excambion had created servitudes of *aquæductus* over the entailed estate, in return for annual payments, which were due to the heir of entail in possession as owner of the servient tenement, and not to the superior of the feus; and (2) that feu-charters granted after the excambion were ineffectual to create such servitude.

<sup>1</sup> *Oswald*, 1848, 10 D. 678.      <sup>2</sup> *Duke of Roxburghe v. Millar*, 1877, 4 R. (H.L.) 76.

<sup>3</sup> *Stewart v. Stewart*, 1877, 4 R. 981.

## EX CAPITE LECTI.

*See* DEATHBED.

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## EXCEPTION.

*See* SHERIFF COURT.

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## EXCEPTION, PERSONAL.

*See* PERSONAL BAR.

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## EXCEPTIONS, BILL OF.

*See* JURIES.



# EXCHEQUER, COURT OF.

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## SECTION 1.—HISTORY.

**972.** Before the Act of Union the Court of Exchequer was the Revenue Court of the Crown, and consisted of the Treasurer, the Treasurer-Depute, and as many Lords of Exchequer as the King was pleased to appoint. Its origin is somewhat obscure, but it would appear to have been originally a ministerial and auditing body, which gradually acquired judicial functions. By chapter 26 of the laws of King Robert III., Sheriffs were bound to account in the Exchequer. By the 19th Article of the Treaty of Union it was provided that a new Court of Exchequer should be established in Scotland, having the same authority in revenue cases as the Court of Exchequer in England. The new Court was established by 6 Anne, c. 26, and declared to consist of the High Treasurer of Great Britain, a Chief Baron, and four Barons of Exchequer. This Court remained in existence as constituted until 1832, when the first of a series of statutes,<sup>1</sup> designed to curtail its functions, was passed. Finally, the Exchequer was abolished as a separate Court by the Court of Exchequer Act, 1856,<sup>2</sup> and its jurisdiction and functions were transferred to the Court of Session.

## SECTION 2.—JURISDICTION.

**973.** The duties of the Court of Exchequer, as constituted by 6 Anne, c. 26, were both judicial and ministerial. On its judicial side it took

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GENERAL AUTHORITIES.—Clerk and Scrope, *Historical View of the Court of Exchequer in Scotland*; Sixth Report of Commission on Courts of Scotland, 1819; West on Extents; Stair, IV. i, 29; Ersk. Inst. I. iii, 30; Bell, Com. ii. 40; Menzies, *Conveyancing*, 837 *et seq.*; Begg, *Conveyancing Code*, 145 *et seq.*; Mackay, *Practice*, i. 43, 192; Maclaren, *Court of Session Practice*, 106–110.

<sup>1</sup> 2 & 3 Will. IV. c. 54; 4 & 5 Will. IV. c. 16; 5 & 6 Will. IV. c. 46; 1 Vict. c. 65; 2 & 3 Vict. c. 36; 18 & 19 Vict. c. 90.

<sup>2</sup> 19 & 20 Vict. c. 56.

cognisance of all questions of customs or excise, and of all other revenues, debts, duties, and profits appertaining to the Crown, and of all lands falling to the Crown by force or virtue of any outlawry or attainder.<sup>1</sup> Besides actions for the recovery of duties, actions of damages against revenue officers for illegal seizures,<sup>2</sup> suspensions and liberations from imprisonment for failure to pay duties,<sup>3</sup> actions relating to ships seized under the Foreign Enlistment Act,<sup>4</sup> and an action for repetition of money paid by the Admiralty under a contract which was alleged not to have been properly fulfilled,<sup>5</sup> have been held to be Exchequer causes. But it is expressly declared that the Court of Session is the sole Court in relation to all disputes and competitions between the Crown and subjects with reference to property in lands, and in all questions regarding casualties due to the Crown.<sup>6</sup> And an action of relief under a bond of caution for a collector of taxes has been held not to be an Exchequer cause.<sup>7</sup> The fact that a case was competent in the Court of Exchequer did not prevent its being also competent in the Court of Session, or even in the Sheriff Court, but it gave the Court of Exchequer the right to intervene by injunction, or, under the Court of Exchequer Act, 1856, s. 14, by interdict. The effect of such an injunction or interdict was that the proceedings in any other Court were brought to an end, and the case was commenced *de novo* in the Court of Exchequer.<sup>8</sup> In the same case it was held that this procedure might be resorted to by the Crown or by an officer of excise wherever the question was duly raised whether goods had been properly seized for a Crown debt.

### SECTION 3.—JURISDICTION OF COURT OF SESSION AS COURT OF EXCHEQUER.

**974.** By the Court of Exchequer Act, 1856,<sup>9</sup> the functions of the Court of Exchequer were transferred to the Court of Session, which was declared to be the Court of Exchequer in Scotland.<sup>10</sup> Any case or proceeding formerly competent in the Court of Exchequer may be heard in the Court of Session, even although not expressly provided for by the Act.<sup>11</sup> Its jurisdiction as a supreme Court cannot be ousted in Exchequer proceedings by later statutes merely by implication.<sup>12</sup> One of the Lords Ordinary is appointed by the Crown to act as Lord Ordinary in Exchequer causes, and Exchequer proceedings, unless where otherwise provided, must be brought before him in the first instance.<sup>13</sup> This provision applies to all causes which would have been previously

<sup>1</sup> 6 Anne, c. 26, s. 6.

<sup>2</sup> *Sharpe v. Miller*, 1861, 23 D. 1015.

<sup>3</sup> *Brough v. Stewart*, 1850, 13 D. 408.

<sup>4</sup> 59 Geo. III. c. 69, s. 7; *H.M. Advocate v. Fleming*, 1864, 2 M. 1032.

<sup>5</sup> *Lord Advocate v. Hogarth*, 1859, 21 D. 213.

<sup>6</sup> 6 Anne, c. 26, s. 22.

<sup>7</sup> *Kinloch v. M'Intosh*, 1822, 1 S. 491 (N.E. 457).

<sup>8</sup> *Sharpe v. Miller*, *supra*.

<sup>9</sup> 19 & 20 Vict. c. 56.

<sup>10</sup> Sec. 1.

<sup>11</sup> *Quarter Sessions of Perth*, 1861, 24 D. 221.

<sup>12</sup> *Mason*, 1899, 7 S.L.T. 25.

<sup>13</sup> Sec. 2.

competent in the Court of Exchequer, and not merely to forms of action introduced by the Act.<sup>1</sup> Accordingly, the jurisdiction conferred on the Court of Exchequer by certain special statutes passed to the Lord Ordinary in Exchequer causes and not to the Junior Lord Ordinary or to the Lord Ordinary on the Bills.<sup>2</sup>

#### SECTION 4.—PROCEDURE.

**975.** An Exchequer case may be initiated by subpœna, which may be called in Court as a summons, or by a summons in ordinary form.<sup>3</sup> In an information by the Crown following on a subpœna,<sup>4</sup> the question was raised but not decided whether the case must be tried by a jury;<sup>5</sup> in a later prosecution it was held by the Lord Ordinary that a jury trial or a proof was equally competent,<sup>6</sup> and in a subsequent case<sup>7</sup> a proof was allowed. An interlocutor of the Lord Ordinary is subject to review as in an ordinary action,<sup>8</sup> with an appeal to the House of Lords. New procedure is introduced in lieu of certain Exchequer processes relating to seizure of goods, writs of capias, writs of the pipe, etc.<sup>9</sup> It is competent to the Court to award expenses to or against the Crown;<sup>10</sup> this provision has been held to apply to an appeal against a conviction in the Justice of the Peace Court,<sup>11</sup> but not to a case stated by Justices of the Peace in Quarter Sessions in a prosecution for penalties under the Excise Acts.<sup>12</sup>

#### SECTION 5.—EXTENSION OF JURISDICTION AFTER 1856.

##### SUBSECTION (1).—*Appeals under the Stamp Act, 1891.*

**976.** An important provision, with regard to revenue cases, has been inserted in the Stamp Acts, and is now enacted by the Stamp Act, 1891. By this provision, the Commissioners of Inland Revenue may be required to decide on the amount of duty due on any particular instrument, and to state a case for the opinion of the Court of Session, sitting as Court of Exchequer, setting forth the question on which their opinion was asked, and the amount of assessment made by them.<sup>13</sup> Before such an appeal, the duty as assessed must be paid. If the appeal is successful the appellant will recover the duty paid, with or without expenses, as the Court may decide; if unsuccessful, he may be found liable in expenses.<sup>14</sup> Such cases are sent directly to either Division of the Court, and not to the Lord Ordinary in Exchequer causes. The

<sup>1</sup> *Balfour*, 1909 S.C. 358.

<sup>2</sup> *Wilson v. Mags. of Forfar*, 1893, 1 S.L.T. 402 (under the Royal Burghs Act, 1822); *Shaw Stewart*, 1905, 13 S.L.T. 39 (under the Defence Act, 1842).

<sup>3</sup> Secs. 5–10.

<sup>4</sup> Sec. 6.

<sup>5</sup> *Lord Advocate v. Thomson*, 1897, 24 R. 543.

<sup>6</sup> *Lord Advocate v. Sawers*, 1898, 35 S.L.R. 482.

<sup>7</sup> *Lord Advocate v. Dalrymple*, 1920, 1 S.L.T. 274.

<sup>8</sup> Sec. 20.

<sup>9</sup> Secs. 11–17.

<sup>10</sup> Sec. 24.

<sup>11</sup> *Massie v. Richardson*, 1900, 8 S.L.T. 238.

<sup>12</sup> *Wilson v. M'Intosh Bros.*, 1878, 5 R. 1097.

<sup>13</sup> 54 & 55 Vict. c. 39, ss. 13, 122 (2).

<sup>14</sup> Sec. 13, subss. (4), (5).



Court has no jurisdiction, in such an appeal, to consider questions of duty arising on the same deed, which have not actually been adjudicated on by the Commissioners.<sup>1</sup>

SUBSECTION (2).—*Appeals under the Taxes Management Act, 1880, and the Income Tax Act, 1918.*

977. By s. 59 of the Taxes Management Act, 1880,<sup>2</sup> after the determination of appeals under the Income Tax Acts either by the General Commissioners or by the Special Commissioners, either side might obtain a stated case for appeal to the Court of Session as Court of Exchequer. This provision is substantially re-enacted by s. 149 of the Income Tax Act, 1918.<sup>3</sup> The Codifying Act of Sederunt, 1913, C, vii, made provision for the initiation before the Lord Ordinary of proceedings by stated case under the earlier Act. In practice, when the stated case is presented to the Lord Ordinary, his jurisdiction is declined by the parties, and the case is transmitted to the Inner House.

#### SECTION 6.—PREFERENCES OF THE CROWN.

978. Shortly after the Union the writ of extent was introduced in order to give the Crown a speedy remedy for recovering moneys due to the Revenue, but this procedure was superseded by certain sections of the Court of Exchequer Act, 1856. In cases requiring dispatch, any officer of the Revenue may make an affidavit of danger, which shall set forth "that a debt or duty is due to the Crown by a Crown debtor believed to be insolvent or to have died insolvent"—the affidavit stating any reasonable ground for such belief, and that there is danger of loss to the Crown if such debt or duty be not immediately recovered. When such an affidavit is made, the Lord Advocate, on behalf of His Majesty, may present a summary petition to the Lord Ordinary in Exchequer causes, setting forth that the debt or duty is resting-owing, and that an affidavit of danger, which must be produced, has been made. "And the Lord Ordinary may thereupon, without further evidence or inquiry, issue *ex parte* a Summary Act and Decree decerning and ordaining such Crown debtor to make payment for such debt or duty"; "provided always that any charge given or threatened on such decree, or any diligence following thereon, may be brought under suspension."<sup>4</sup>

979. All decrees by the Lord Ordinary in Exchequer causes may be reclaimed against,<sup>5</sup> and any decree of the Inner House may be extracted without abiding the expiry of the days of the Minute Book. The extractor is to give priority to such decrees; and they, and also decrees proceeding upon bonds or other obligations to His Majesty on which execution may proceed, shall be as nearly as possible in ordinary form,

<sup>1</sup> *Maxwell v. Comrs. of Inland Revenue*, 1866, 4 M. 1121.

<sup>2</sup> 8 & 9 Geo. V. c. 40.

<sup>4</sup> 1856 Act, s. 16.

<sup>2</sup> 43 & 44 Vict. c. 19.

<sup>5</sup> Sec. 20.

except that in such cases the extractor is to insert in the extract a warrant to "Sheriffs" to charge and execute diligence according to a form given in a schedule.<sup>1</sup> These decrees are to be put in execution by Sheriffs on the demand of any public officer.<sup>2</sup> The Sheriffs have power to arrest on such decrees, and the arrestment transfers to the Crown the arrested fund, so far as necessary to pay the Crown debt, with interest and expenses.<sup>3</sup> They may also charge the Crown debtor,<sup>4</sup> and on the expiry of the days of charge they may poind the Crown debtor's whole moveable effects without exception. The poinding is to be carried through in ordinary form, except that the goods may be removed from the possession of the debtor; and when they are offered for sale, if no offerer appears, the Sheriff is to retain, at the appraised value, such part as is required to satisfy the Crown debt.<sup>5</sup> Thereafter the extract and execution of charge may be recorded, and a warrant to imprison be obtained, on which the debtor may still be imprisoned for the period permitted by the Debtors (Scotland) Act, 1880, namely, twelve months.<sup>6</sup> The Crown has also the right of seizing the books of the Crown debtor under the extract decree;<sup>7</sup> and all bonds or obligations granted to His Majesty, albeit not containing any clause of registration, shall be capable of registration for the purpose of execution.<sup>8</sup> When the bond does not state any specific sum as due to the Crown, a certificate under the hand of an officer of the Revenue, setting forth the sum due, shall be sufficient evidence of what is due, and the extractor shall make the warrant of charge applicable to that sum.<sup>9</sup>

**980.** In the case of a deceased debtor, the Crown may attach his effects by arrestment and poinding, and that without taking any proceedings against the executor of such debtor. It can do this, whether it proceed under a decree for the sum sued for, or under a bond granted by the deceased person to His Majesty. Furthermore, on an affidavit that the debtor is dead, the Sheriff who is putting the decree or extract in execution may arrest in the hands of any person indebted to such debtor, and also poind the deceased person's whole moveable effects in the same manner as if the deceased person had been in life.<sup>10</sup> Finally, it is declared that the execution of any charge at the instance of the Crown, and in the case of a deceased Crown debtor the execution of an arrestment or poinding for behoof of the Crown, shall be equivalent to the teste of a writ of extent. This section also saves the preference of the Crown in competition with other creditors.<sup>11</sup>

#### SECTION 7.—PRESENTER OF SIGNATURES.

**981.** Although no record exists of the origin in the Scottish Court of Exchequer of the office of Presenter of Signatures, it is probable

<sup>1</sup> Sec. 28.

<sup>2</sup> Sec. 29.

<sup>3</sup> Sec. 30.

<sup>4</sup> Sec. 31.

<sup>5</sup> Sec. 32.

<sup>6</sup> Secs. 33, 34.

<sup>7</sup> Sec. 35.

<sup>8</sup> Sec. 38.

<sup>9</sup> Sec. 39.

<sup>10</sup> Sec. 36.

<sup>11</sup> Sec. 42.

that it was established soon after the union of the Crowns of England and Scotland. The office was recognised, and continued as then existing, by the Act reconstituting the Court of Exchequer, after the Treaty of Union.<sup>1</sup> It was abolished by s. 57 of the Conveyancing Act, 1874, by which the duties of the Presenter, so far as these still existed, were transferred to the Sheriff of Chancery. For procedure, see Conveyancing Act, 1868, s. 88. For an account of the duties of the Presenter of Signatures in connection with Crown charters and writs of *clare constat*, see CHANCERY, Vol. III. p. 197, *ante*.

#### SECTION 8.—APPEALS IN EXCHEQUER PROSECUTIONS.

**982.** By s. 41 of the Court of Exchequer Act, 1856, the jurisdiction of Sheriffs and Justices of the Peace was reserved. By the Summary Jurisdiction (Scotland) Act, 1881,<sup>2</sup> s. 11, revenue prosecutions were made subject to the provisions of the Summary Jurisdiction Acts, which gave right of appeal to the High Court of Justiciary, but at the same time the section provided that such prosecutions should continue to be subject to appeal to Quarter Sessions and to the Court of Exchequer. Accordingly it was held by a full bench in the Court of Justiciary that the decisions of inferior magistrates in prosecutions under the Revenue Acts could be competently brought under review in the High Court and need not necessarily be taken to Quarter Sessions or to the Court of Session as Court of Exchequer.<sup>3</sup> It was further held in an excise prosecution that the High Court had no jurisdiction, save in exceptional circumstances, to entertain a suspension of a conviction in the Justice of the Peace Court, but that the complainer should have proceeded either by stated case in the High Court or by appeal to Quarter Sessions or to the Court of Exchequer.<sup>4</sup>

<sup>1</sup> 6 Anne, c. 26, s. 19.

<sup>2</sup> 44 & 45 Vict. c. 33.

<sup>3</sup> *Schulze v. Steele*, 1890, 17 R. (J.) 47; 2 White, 449.

<sup>4</sup> *Mackenzie v. Martin*, 1891, 18 R. (J.) 16; 2 White, 589.



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## SECTION 1.—INTRODUCTORY.

**983.** Excise duties are Inland duties or imposts levied upon (a) the manufacture, (b) the sale, or (c) the consumption of certain commodities

within the country. The term "Excise" is also applied to a tax levied upon the pursuit of certain sports, trades or occupations—in these cases usually taking the form of a licence-duty.<sup>1</sup> Excise duties were first introduced into Scotland by an Act of 1644 (c. 36), but such duties were not placed upon a permanent basis until the reign of Charles II. when, by an Act of 1661 (c. 14), duties were imposed upon certain commodities, some imported from abroad and others manufactured at home. Provisions regulating Excise are entirely statutory, and as the duties are varied from year to year by Parliament, it is only by reference to the statutes that duties and penalties exigible at a particular date can be ascertained.

## SECTION 2.—MANAGEMENT OF THE EXCISE.

**984.** As with the Customs, the collection and management of the Excise duties of the United Kingdom are under the control of the Commissioners of Customs and Excise. The powers of the Officers of Excise appointed by them are similar to those of Customs Officers, which have been dealt with in detail elsewhere. See "CUSTOMS."<sup>2</sup> The law relating to the collection and management of Excise duties in this country was first systematically dealt with by the Excise Management Act of 1827,<sup>3</sup> which, amended by numerous subsequent Acts, forms the basis of the existing law.

**985.** The subject of "Excise" may be most conveniently dealt with under the headings of (1) Excise Duties, and (2) Excise Licences, (*a*) to manufacture certain commodities, (*b*) to carry on certain trades or businesses, and (*c*) local taxation licences.

## SECTION 3.—EXCISE DUTIES.

### SUBSECTION (1).—*Betting Duty.*

**986.** Since 1st November 1926 the following duties of Excise are payable: (1) a betting duty on every bet made with a bookmaker at the rate of  $3\frac{1}{2}$  per cent. of the amount paid, offered, or promised to be paid to or to the order of, or for the use of the bookmaker, and at the rate of 2 per cent. on bets made with a bookmaker on a race-course on the day on which horse-racing takes place thereon; (2) on a bookmaker's certificate, which must be taken out annually by the bookmaker—a duty of £10; and (3) on an entry certificate, to be taken out annually by a bookmaker in respect of the entry for any betting premises kept or used by him—a duty of £10.

**987.** The duty is payable by the bookmaker with whom the bet is made, and, unless he has made an arrangement with the Commissioners for furnishing returns of all bets made with him, and has given approved security for the payment of betting duty thereon, he must on the making of a bet issue to the person who has made the bet a revenue ticket, in

<sup>1</sup> Webster's International Dictionary.    <sup>2</sup> Vol. V. p. 365, *ante*.    <sup>3</sup> 7 & 8 Geo. IV. c. 53.

a prescribed form, denoting that the duty has been paid. Betting duty not paid by means of a revenue ticket is recoverable from the bookmaker as a debt due to the Crown, and if under £50 in amount, may be recovered by the Commissioners summarily as a civil debt. Bookmakers' certificates and entry certificates expire on 31st October in each year.<sup>1</sup>

**988.** The Commissioners may, by written agreement with any police authority, arrange for the exercise of their powers in relation to betting duty by the police.<sup>2</sup> Penalties are imposed upon any person who contravenes or fails to comply with the provisions of the Act, carries on business as a bookmaker without having a proper certificate, or keeps or uses betting premises without a proper entry certificate.<sup>3</sup> Persons accepting a bet without issuing a revenue ticket, or who fail on demand by the competent authority to produce a bookmakers' certificate, may without warrant be arrested by any officer.<sup>4</sup> See also GAMING, BETTING, AND LOTTERIES.

#### SUBSECTION (2).—*Brewing.*

**989.** There are many Acts of Parliament regulating the manufacture of beer and imposing various taxes on brewers. The basis of the present law dealing with brewing is the Inland Revenue Act of 1880<sup>5</sup> which repealed all the earlier Acts dealing with this subject. This Act abolished the duty on malt, and substituted for it an Excise duty to be paid by brewers on the beer brewed by them. Under this Act the term "beer," for the purpose of levying a duty on beer and a duty on licences for the manufacture of beer, was defined as including ale, porter, spruce beer and black beer, and any other description of beer.<sup>6</sup> This definition, however, was amended by the Customs and Inland Revenue Act of 1885<sup>7</sup> so as to include any liquor made or used as a description of or substitute for beer, and which contains more than 2 per cent. of proof spirit, and the definition as amended was inserted in the Finance (1909-10) Act, 1910,<sup>8</sup> and is the present definition of the word "beer."

**990.** For the purposes of the Act brewers are divided into two classes, (1) brewers of beer for sale, and (2) brewers of beer not for sale, *i.e.* persons who brew beer for use either of themselves or for farm labourers employed by them in the actual course of their labour or employment.<sup>9</sup> A brewer of beer not for sale, who occupies a house of not more than £8 annual value, may brew beer for his own domestic use only without being liable to pay duty on the beer brewed. He is, however, restricted to four bushels of malt for brewing purposes in any one year.<sup>10</sup> A brewer of beer not for sale occupying a house exceeding £8 but not exceeding £10 annual value may brew beer for domestic use and for

<sup>1</sup> 16 & 17 Geo. V. c. 22, s. 15.

<sup>2</sup> *Ibid.*, s. 16 (4).

<sup>3</sup> *Ibid.*, s. 17 (1).

<sup>4</sup> *Ibid.*, s. 17 (2).

<sup>5</sup> 43 & 44 Vict. c. 20.

<sup>6</sup> *Ibid.*, s. 2.

<sup>7</sup> 48 & 49 Vict. c. 51, s. 4 (1).

<sup>8</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 52.

<sup>9</sup> 43 & 44 Vict. c. 20, s. 34 (1) and (2).

<sup>10</sup> 12 & 13 Geo. V. c. 17, s. 8.



his farm workers without payment of duty.<sup>1</sup> If he occupies a house exceeding £10 but not exceeding £15 annual value, and brews beer wholly for his own domestic use, he pays no beer duty thereon.<sup>2</sup> In all other cases brewers of beer not for sale must pay duty on the beer brewed.

**991.** The basis upon which duty on beer is calculated is the quantity of "worts" produced in the process of brewing. "Wort" is a sweet or saccharine infusion of malt or other material which on fermentation produces the alcohol present in beer. A brewer of beer for sale must pay the duty upon the quantity of "worts" which have been, or which are deemed to have been, produced during the brewing process, whichever quantity is the greater. A brewer of beer not for sale, when liable for beer duty, must pay the duty on the "worts" presumed to have been produced from the ingredients employed. A brewer is deemed to have brewed 36 gallons of "worts" of a statutory gravity for every 2 bushels of malt entered or used by him in brewing.<sup>3</sup> The original gravity of beer is determined by reference to a table signed by the Chairman of Commissioners of Customs and Excise and deposited in the Office of the King's Remembrancer.<sup>4</sup>

**992.** A brewer of beer for sale must keep a book in a prescribed form (available for inspection by an Excise Officer at any time) in which he must enter twenty-four hours before the brewing commences the quantities of materials to be used in each brewing. The particulars of the quantity and gravity of the "worts" produced from each brewing must also be entered,<sup>5</sup> and it is upon these figures as entered in the book or as determined by the inspecting Excise Officer that the duty on beer is charged.<sup>6</sup> The Commissioners of Customs and Excise have power to make regulations under which a brewer of beer for sale may warehouse beer produced in the United Kingdom in approved premises, and may thereafter remove the beer therefrom for export or for ships' stores without payment of duty.<sup>7</sup> Drawback or repayment of the duty at the rate prevalent at the time of shipment may be claimed on beer exported abroad, or to the Channel Islands, or Isle of Man, or for ships' stores.<sup>8</sup>

**993.** There are numerous statutory provisions dealing with the inspection of premises, vessels, and utensils by Excise Officers before any person commences the business of brewing, and as to the duties and powers of Excise Officers to inspect breweries, and as to the mode of working.

**994.** The adulteration of beer by brewers for sale is prohibited by the Customs and Inland Revenue Act of 1885 under the penalty of forfeiture of the beer and a fine of £50.<sup>9</sup> It has been held that

<sup>1</sup> 9 & 10 Geo. V. c. 32, s. 6 (1) and (2).

<sup>2</sup> *Ibid.* ; 10 Edw. VII. c. 8, Sch. I. A, scale 2, provision 2.

<sup>3</sup> 43 & 44 Vict. c. 20, s. 13 ; 52 & 53 Vict. c. 7, s. 3 (1).

<sup>4</sup> 5 Geo. V. c. 7, s. 7 (1).

<sup>5</sup> *Ibid.*, s. 13.

<sup>6</sup> 43 & 44 Vict. c. 20, s. 36. ; 59 & 60 Vict. c. 28, s. 9.

<sup>7</sup> 43 & 44 Vict. c. 20, s. 20.

<sup>8</sup> 5 Geo. V. c. 7, s. 6.

<sup>9</sup> 43 & 49 Vict. c. 51, s. 8.

to mix strong with weak beer is adulteration,<sup>1</sup> and a drink called "botanic beer," made of herbs, etc. and containing over five per cent. of alcohol was held to be chargeable as beer under the same Act.<sup>2</sup> The use of "saccharine" and some other substances in beer is also prohibited under the Customs and Inland Revenue Act of 1888.<sup>3</sup>

### SUBSECTION (3).—*Cards (Playing).*

**995.** The present Excise duty of 3d. per pack (of 52 cards) on playing cards made for sale in the United Kingdom was imposed by the Revenue Act of 1862,<sup>4</sup> which also details the manner in which the duty is to be paid and collected. The duty is to be denoted by a stamp on the wrapper of every pack, and the wrappers are provided for the purpose by the Commissioners of Inland Revenue, and are supplied by them to licensed manufacturers of cards. Cards must be sold in separate packets, each enclosed in a stamped wrapper in such a manner that the cards cannot be taken out without destroying the wrapper.<sup>5</sup> Penalties are imposed upon makers of cards selling packs without stamped wrappers,<sup>6</sup> and on persons using a wrapper which has already been used for enclosing a pack of cards for enwrapping any other pack.<sup>7</sup> No penalty is imposed upon a person selling second-hand cards to a licensed maker of cards without himself having a licence for selling cards and without such cards being enclosed in the wrappers provided under the Act.<sup>8</sup>

**996.** A licensed maker of cards may export without wrappers cards made by him to the Isle of Man or abroad, provided that he has given bond in a penalty of £500 with one or more sureties to the satisfaction of the Commissioners, and provided further that before removing the cards from his premises he has given notice of his intention to export them, and has got from the Commissioners a certificate authorising the removal and exportation of the cards specified, and has placed the cards on board ship within a period of not more than seven days from the date of the certificate.<sup>9</sup> A licensed maker may also place in warehouse and remove therefrom cards not enclosed in stamped wrappers for exportation or for shipment as stores, under regulations made by the Commissioners of Customs and Excise.<sup>10</sup>

### SUBSECTION (4).—*Chicory.*

**997.** The duty on chicory imposed by the Excise Act of 1860<sup>11</sup> and subsequent Acts was repealed by the Finance Act of 1926<sup>12</sup> as from 4th August 1926.

<sup>1</sup> *Crofts v. Taylor*, 1887, 19 Q.B.D. 524.

<sup>3</sup> 51 & 52 Vict. c. 8, s. 5.

<sup>5</sup> *Ibid.*, s. 29.

<sup>7</sup> *Ibid.*, s. 35.

<sup>9</sup> *Ibid.*, s. 37.

<sup>11</sup> 23 & 24 Vict. c. 13.

<sup>2</sup> *Howboth v. Minus*, 1886, 51 J.P. 7.

<sup>4</sup> 25 & 26 Vict. c. 22.

<sup>6</sup> *Ibid.*, s. 32.

<sup>8</sup> *Ibid.*, s. 36.

<sup>10</sup> 11 & 12 Geo. V. c. 32, s. 13.

<sup>12</sup> 16 & 17 Geo. V. c. 22, Sched. V. Pt. ii.

SUBSECTION (5).—*Cider, Perry, and Table Waters.*

**998.** The Excise duties on these articles which were first imposed by the Finance (New Duties) Act, 1916,<sup>1</sup> were repealed so far as concerns cider and perry by the Finance Act of 1923<sup>2</sup> as from 1st May 1923, and as regards table waters and also herb beer by the Finance Act of 1924<sup>3</sup> as from 1st August 1924. The power of an Officer of Excise to enter any premises in which table waters liable to duty are made or kept for sale, conferred by the Finance (New Duties) Act of 1916, is continued although the Excise duty on such table waters has been repealed.<sup>4</sup>

SUBSECTION (6).—*Clubs (Supply of Intoxicating Liquors to).*

**999.** Under the Finance (1909–10) Act, 1910, the secretary of every registered club must annually in January deliver to the Commissioners a statement of the purchases during the preceding calendar year of intoxicating liquors supplied in or to the club, or on behalf of the club to the members thereof.<sup>5</sup> The Excise duty is charged on the amount of the liquors so supplied according to the statement, the present rate being 3d. in the pound.<sup>6</sup> The secretary is liable on summary conviction to a fine for a first offence and to a fine or imprisonment or both for subsequent offences on failure to deliver the statement to the Commissioners after a notice from them requiring him to do so has been served upon him; and he is also liable to a fine or imprisonment or both if he delivers a false statement.<sup>7</sup> If the duty payable remains unpaid after the 1st day of March, or if the secretary of the club fails in any year to deliver the statement required under the Act, the supply of any intoxicating liquor in the club shall, so long as the duty remains unpaid or the failure continues, be deemed to be a sale of intoxicating liquor without a licence.<sup>8</sup>

SUBSECTION (7).—*Coffee and Chicory Substitutes.*

**1000.** In terms of the Customs and Inland Revenue Act of 1882<sup>9</sup> an Excise duty was imposed upon every quarter of a pound weight of any article or substance prepared or manufactured for the purpose of being in imitation of, or in any respect to resemble or to serve as a substitute for coffee or chicory, or of any mixture of such article or substance with coffee or chicory which is held or kept for sale in the United Kingdom. The conditions upon which such substitutes and mixtures may be sold are set forth in the Act of 1882.<sup>10</sup> The substitute or mixture must be sold in packets each containing one quarter of a pound or any

<sup>1</sup> 6 & 7 Geo. V. c. 11, ss. 4 and 5.

<sup>2</sup> 14 & 15 Geo. V. c. 21, s. 10 (1).

<sup>3</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 48.

<sup>4</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 48 (2).

<sup>5</sup> 45 & 46 Vict. c. 41, s. 5.

<sup>6</sup> 13 & 14 Geo. V. c. 14, s. 4.

<sup>7</sup> *Ibid.*, s. 10 (3).

<sup>8</sup> 12 & 13 Geo. V. c. 17, s. 9.

<sup>9</sup> *Ibid.*, s. 48 (4).

<sup>10</sup> *Ibid.*, s. 6.



multiple of quarters of a pound. On each packet must be affixed a label (indicating the amount of duty payable) so placed that it is destroyed when the packet is opened. Packets containing a mixture of coffee with other substances must bear a label denoting the proper names of the several articles or substances with which such mixture is composed. Penalties are imposed upon persons for dealing in such substitutes without conforming to the statutory regulations, and for affixing to any packet of coffee or chicory substitutes labels which have already been used.<sup>1</sup> The present rate of Excise duty payable on these substitutes or mixtures is  $\frac{1}{2}$ d. per quarter pound.<sup>2</sup>

SUBSECTION (8).—*Entertainments Duty.*

**1001.** From 15th May 1916 this duty, by the Finance (New Duties) Act, 1916,<sup>3</sup> has been imposed on all payments for admission to any entertainment. The word "entertainment" is defined as including any exhibition, performance, amusement, game, or sport to which persons are admitted for payment; and the word "admission" as admission as a spectator or one of an audience. "Payment on admission" includes any payment made by a person who, having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof, for admission to which a payment involving duty or more duty is required.<sup>4</sup>

**1002.** Unless the proprietor of an entertainment has made arrangements approved by the Commissioners for furnishing returns of the payments for admission, and has given approved security for the payment of duty in cases where payment for admission is subject to duty, no person shall be admitted except with a ticket stamped with a stamp indicating that the proper entertainments duty has been paid, or, in special cases, with the approval of the Commissioners, through a contrivance which automatically registers the number of persons admitted.<sup>5</sup>

**1003.** Where payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any club, association, or society, or for a season ticket, or for the right of admission to a series of entertainments, or to any entertainment during a certain period of time, the duty is to be paid on the amount of the lump sum, unless it appears to the Commissioners that such a payment represents payment for privileges, rights, or purposes besides the admission to an entertainment. In such cases the duty shall be charged on such a sum as appears to the Commissioners to represent only the right of admission to the entertainments in respect of which the duty is payable.<sup>6</sup> So where a subscription was paid for admission to a dinner followed by a concert, it was held that the concert was in fact a separate

<sup>1</sup> 45 & 46 Vict. c. 41, s. 7.

<sup>3</sup> 6 & 7 Geo. V. c. 11, s. 1.

<sup>5</sup> *Ibid.*, s. 1 (2).

<sup>2</sup> 14 & 15 Geo. V. c. 21, s. 3 (3).

<sup>4</sup> *Ibid.*, s. 1 (6).

<sup>6</sup> *Ibid.*, s. 1 (4).

entertainment in respect of which duty was payable on such a sum as the Commissioners might determine.<sup>1</sup>

**1004.** In addition to exemption from duty, when the price of admission does not exceed 6d.,<sup>2</sup> exemption from payment of entertainments duty is given in the following cases where the Commissioners are satisfied:

- (a) That the whole gross takings of the entertainment are devoted to philanthropic or charitable purposes; or
- (b) That the entertainment is of a wholly educational character. In the case of any difference of opinion upon that point the question is to be determined by the Scottish Education Department; or
- (c) That the entertainment is provided for partly educational or partly scientific purposes by a society, institution, or committee not conducted or established for profit, or is provided by any such society or institution which has been founded with the object of reviving national pastimes, in furtherance of that object;<sup>3</sup> or
- (d) That the entertainment is provided by or on behalf of a school or other educational institution (including organisations certified by a Local Education Authority to be established and conducted for the purpose of providing social or physical training for children or young persons who are attending or have attended schools provided, aided, or maintained by that Authority) not conducted or established for profit; that it is provided solely for the purpose of promoting some object in connection with the school or institution; and that all the persons taking part as performers in the entertainment are persons who are receiving or have received instruction in the school or institution;<sup>4</sup> or
- (e) that the entertainment is provided by a society not conducted for profit and that it consists solely of an exhibition (1) of the products of an industry, or of machinery or materials used in the manufacture of those products, or of displays of skill by workers in the industry, (2) of works of art executed and exhibited by persons who practice such arts for profit and as their main occupation, or (3) of articles and displays of skill of material interest in connection with questions relating to the public health.<sup>5</sup>

These three last-mentioned classes of exhibitions may be accompanied by a performance of music by a band, by an exhibition of work, or by displays of skill by children under the age of sixteen years,

<sup>1</sup> *Attorney-General v. M<sup>c</sup>Leod*, [1918] 1 K.B. 13; *Attorney-General v. Swan*, [1922] 1 K.B. 682; *Attorney-General v. Valentine*, 1924, 41 T.L.R. 78.

<sup>2</sup> 14 & 15 Geo. V. c. 21, s. 6 (1).

<sup>3</sup> 6 & 7 Geo. V. c. 11, s. 1 (5).

<sup>4</sup> 6 & 7 Geo. V. c. 24, s. 12; 11 & 12 Geo. V. c. 32, s. 8; 13 & 14 Geo. V. c. 14, s. 12.

<sup>5</sup> 11 & 12 Geo. V. c. 32, s. 7; 12 & 13 Geo. V. c. 17, s. 13.

or young persons attending a school or other educational institution. In this connection a society is held to include a company, institution or other association of persons by whatever name called.<sup>1</sup>

(f) That it is promoted by a society or institution of a permanent character established or conducted solely or partly for philanthropic or charitable purposes, or by two or more such societies or institutions acting together; that the whole of the nett proceeds of the entertainment are devoted to philanthropic or charitable purposes; and that the whole of the expenses of the entertainment do not exceed 50 per cent. of the receipts.<sup>2</sup>

**1005.** The rules under which admission to entertainments subject to duty are regulated are set forth in the Entertainments Duty Regulations, 1921,<sup>3</sup> issued by the Commissioners of Customs and Excise. These regulations prohibit the marking of Government tickets or adhesive stamps by, and the purchase of such tickets or stamps from, unauthorised persons. The price of admission must be printed on the tickets, and adhesive stamps are not to be issued unless affixed to tickets. Only Government tickets and duty-stamped tickets may be issued on payments made for admission. Tickets and stamps must, after issue, be collected by the proprietor of the entertainment and defaced. No Government ticket must be issued to cover the admission of more than one person. Other tickets issued to admit more than one person must specify the number of persons authorised to be admitted and the total price charged for the ticket. The duty may be calculated and paid on a lump sum paid for a season ticket (or, in the case of a club, paid as a subscription or contribution) which must, before issue, be marked with the name of the person to whom it is to be issued, and the duty-stamp affixed thereon must be defaced by having the date of issue written thereon in ink prior to issue.

#### SUBSECTION (9).—*Glucose.*

**1006.** An Excise duty upon glucose made in the United Kingdom was imposed in 1901.<sup>4</sup> The duty may be charged either on the quantity actually manufactured, or by reference to the quantity ascertained by the Commissioners to be capable of being produced from the saccharine solution collected in a receiver to be provided by the manufacturer and to be fixed to the satisfaction of the Commissioners.<sup>5</sup> The Commissioners are empowered to make regulations governing the manufacture of glucose for the purpose of managing and collecting the duties, and may in such regulations apply any enactments relating to the Excise duty or drawback on beer, and to brewers of beer, to the license duty and drawback on glucose, and to manufacturers of glucose.<sup>6</sup> In pursuance of these

<sup>1</sup> 13 & 14 Geo. V. c. 14, s. 11 (1); 14 & 15 Geo. V. c. 21, s. 7.

<sup>3</sup> 6 & 7 Geo. V. c. 11; S.R. & O. 1921, No. 1388.

<sup>5</sup> *Ibid.*, s. 5 (2).

<sup>2</sup> 14 & 15 Geo. V. s. 6 (4).

<sup>4</sup> 1 Edw. VII. c. 7, s. 5 (1).

<sup>6</sup> *Ibid.*, s. 9.



powers the Commissioners issued regulations in 1901.<sup>1</sup> A drawback on glucose, liable to duty, equal to the duty imposed is allowed on glucose exported as merchandise or shipped as ship's stores.<sup>2</sup> A drawback is also allowed on duty-paid glucose deposited in an approved warehouse for the manufacture of Cavendish and Negrohead tobacco.<sup>3</sup>

#### SUBSECTION (10).—*Matches.*

**1007.** From 5th April 1916 an Excise duty has been levied upon matches manufactured in the United Kingdom.<sup>4</sup> The duty is charged upon each thousand containers, and is estimated according to the number of matches in each container.<sup>5</sup>

#### SUBSECTION (11).—*Medicines.*

**1008.** Originally a stamp duty first levied in 1783 upon packets of certain medicines,<sup>6</sup> this impost was made a duty of Excise in 1908.<sup>7</sup> The Stamp Act of 1804<sup>8</sup> is now the main authority for the existence of the present duties, while the particular drugs and medicines chargeable with duty are set forth in the schedule to the Medicines Stamp Act of 1812.<sup>9</sup>

**1009.** The duty, which is calculated upon an *ad valorem* basis, is payable by the owners, makers, or original sellers of dutiable medicines, drugs, and preparations before such goods are sold or exposed or offered for sale, or delivered out of their custody or possession, either for home or foreign consumption.<sup>10</sup> The duty is denoted by appropriate labels announcing the amount of duty paid upon each packet or other container; and the labels must be affixed so as to ensure their destruction when the packets are opened.<sup>11</sup> The labels are obtainable from the Commissioners of Inland Revenue.<sup>12</sup> Penalties are imposed upon the fraudulent use of medicine labels already used,<sup>13</sup> selling or buying used labels for the purpose of using them again, or selling any packet of drugs with such a label.<sup>14</sup>

**1010.** Persons who receive from a proprietor, manufacturer or original vendor, for the purpose of sale, any medicines not labelled as required by statute are liable to forfeiture of the goods and fine, unless within ten days they return the goods to the persons from whom they obtained them, or unless within that period they inform the Commissioners of the reception of the unlabelled packets and deposit the goods with the nearest distributor of stamps.<sup>15</sup> Penalties are imposed upon persons

<sup>1</sup> S.R. & O. 1901, No. 604, Pt. ii.

<sup>2</sup> 1 Edw. VII. c. 7, 3rd Sched.

<sup>3</sup> 8 & 9 Geo. V. c. 15, s. 13 (1); S.R. & O. 1920, No. 1509.

<sup>4</sup> 6 & 7 Geo. V. c. 11, s. 3.

<sup>5</sup> 17 & 18 Geo. V. c. 10, s. 8 (2); and 3rd Sched. Pt. ii.

<sup>6</sup> 23 Geo. III. c. 62; 25 Geo. III. c. 79.

<sup>7</sup> 8 Edw. VII. c. 16, s. 4 (4).

<sup>8</sup> 44 Geo. III. c. 98, s. 2 and Sched. B.

<sup>9</sup> 52 Geo. III. c. 150.

<sup>10</sup> 42 Geo. III. c. 56, s. 3.

<sup>11</sup> *Ibid.*, ss. 10 and 11.

<sup>12</sup> Excise Transfer Order, 1909 (No. 197), para. 20.

<sup>13</sup> 42 Geo. III. c. 56, s. 13.

<sup>14</sup> *Ibid.*, s. 14.

<sup>15</sup> 43 Geo. III. c. 73, s. 2.

selling, keeping for, or exposing to sale, or buying for home or foreign consumption any packets or other containers of dutiable medicine without the statutory label or wrapping.<sup>1</sup>

**1011.** Certain medicines and drugs are exempted from duty. The exemptions are:—

(1) Under the Medicines Stamp Act, 1812:<sup>2</sup>

- (a) All drugs mentioned in the book of rates subscribed with the name of Sir Harbottle Grinston, and referred to in s. 4 of the Tonnage and Poundage Act, 1660.
- (b) All medicinal drugs manufactured or sold entire, without any mixture with any other drug, by any surgeon or chemist who has served a regular apprenticeship; by any person who has served as a surgeon in the navy or army under a regular commission; or by any other person licensed to sell any dutiable medicines.
- (c) All medicines and drugs made up or sold by any such surgeon, chemist, or naval or military surgeon, provided that the names, composition, and properties of such mixtures are known and approved of in the cure or relief of any ailment; that the maker or seller makes no claim to an exclusive right to the manufacture of the mixture; and that neither by advertisement nor by any labels or words affixed in any way to the packet or bottle are such nostrums recommended to the public by the owners or manufacturers or original vendors thereof as nostrums, proprietary medicines or specifics, or as beneficial for the prevention, cure, or relief of any ailment.

(2) Under the Stamp Act, 1815.<sup>3</sup>

Ginger and peppermint lozenges and any other article of confectionery, unless the seller shall vend the same as medicines, or as beneficial for the prevention, cure, or relief of any ailment.

**1012.** In reference to the foregoing exemptions it may be noted that it has been held that “regular apprenticeship” means an apprenticeship under a written agreement or instrument, and that this term does not cover the case of an oral arrangement even when followed by regular service.<sup>4</sup> The phrase “entire drug” has been held not to include the mixture of a drug entire in itself with other substances, even although they had no active medicinal effect in the mixture,<sup>5</sup> nor does this phrase apply to a tincture prepared by the mixture of a pure or entire drug with spirits of wine.<sup>6</sup> Retail chemists who purchase medicinal preparations, which are not liable to duty, from the manufacturers, are entitled to affix to the bottles in which they retail the preparations labels recom-

<sup>1</sup> 52 Geo. III. c. 150, s. 2.

<sup>2</sup> *Ibid.*, Schedule.

<sup>3</sup> 55 Geo. III. c. 184, s. 54.

<sup>4</sup> *Kirsby v. Taylor*, [1910] 1 K.B. 529.

<sup>5</sup> *Knoll & Co. v. Renshaw*, [1916] 1 K.B. 700.

<sup>6</sup> *Smith v. Mason & Co.*, [1894] 2 Q.B. 363.

mending them as beneficial for certain ailments in respect that they are not the owners, proprietors or original vendors.<sup>1</sup>

**1013.** The Excise duties on medicines were doubled by the Finance Act (No. 2), 1915,<sup>2</sup> and are still levied at this increased rate.<sup>3</sup>

#### SUBSECTION (12) —*Saccharine.*

**1014.** By the Finance Act, 1901,<sup>4</sup> an Excise duty was imposed upon saccharine (including substances of a like nature or use) made in the United Kingdom. By the same Act the Commissioners of Customs and Excise were authorised to make regulations for the purpose of controlling the manufacture of saccharine and for the management and collection of the Excise duty payable thereon.<sup>5</sup> Regulations were accordingly issued in 1903 and 1904.<sup>6</sup> A drawback equal to the duty imposed is allowed on saccharine exported as merchandise or shipped as ships' stores.<sup>7</sup>

#### SUBSECTION (13).—*Silk (Artificial).*

**1015.** An Excise duty of 1s. on every pound weight of artificial silk yarn or straw manufactured in the United Kingdom (other than yarn produced by spinning from artificial silk waste on which duty has been paid), and an Excise duty of 6d. on every pound weight of artificial silk waste so manufactured, were imposed by the Finance Act, 1925.<sup>8</sup> The Commissioners of Customs and Excise are given power to make regulations applying to the Excise duty and drawback on such goods any enactments relating to any duty or drawback of Excise, as well as providing for any exemption required for the purpose of relieving from duty any artificial silk intended for exportation.<sup>9</sup> The Commissioners' regulations were published in 1925.<sup>10</sup>

#### SUBSECTION (14).—*Spirits.*

**1016.** An Excise duty is levied upon every gallon of proof spirit manufactured by a licensed distiller in the United Kingdom. The word "spirit" is defined by statute as spirits of any description and, as including all liquors mixed with spirits, and all mixtures, compounds, or preparations made with spirits.<sup>11</sup> The word "proof" is similarly defined as the strength of proof as ascertained by Sike's hydrometer,<sup>12</sup> or by any other means authorised by regulations made by the Commissioners

<sup>1</sup> *Farmer v. Glynn Jones*, [1903] 2 K.B. 6.

<sup>2</sup> 5 & 6 Geo. V. c. 89, s. 11.

<sup>3</sup> 17 & 18 Geo. V. c. 10, s. 2.

<sup>4</sup> 1 Edw. VII. c. 7, s. 5 (1).

<sup>5</sup> *Ibid.*, ss. 8 and 9; 3 Edw. VII. c. 48, s. 2.

<sup>6</sup> S.R. & O. 1903, No. 62, Pt. ii.; S.R. & O. 1904, No. 633.

<sup>7</sup> 1 Edw. VII. c. 7, 3rd Sched.

<sup>8</sup> 15 & 16 Geo. V. c. 36, s. 5 (1); and 2nd Sched., Pts. ii. and iii.

<sup>9</sup> *Ibid.*, s. 5 (d) and (e).

<sup>10</sup> S.R. & O. 1925, No. 929; S.R. & O. 1925, No. 627.

<sup>11</sup> 43 & 44 Vict. c. 24, s. 3.

<sup>12</sup> 58 Geo. III. c. 28, s. 2.



of Customs and Excise.<sup>1</sup> The term "proof spirits" means spirits which, at the temperature of 51° Fahrenheit, weigh exactly  $\frac{1\frac{1}{2}}{1\frac{1}{3}}$  of an equivalent measure of distilled water.<sup>2</sup> The strengths of spirits as denoted by the hydrometer have been set out in tabulated forms lodged by the Commissioners in the office of the King's Remembrancer.<sup>3</sup>

**1017.** The duty on spirits made in a distillery is charged on the "wort" or "wash" (the saccharine solution formed by fermentation in the process of producing alcohol), on the "low wines" (or spirits of the first extraction which have been conveyed into a special receptacle), and on the "feints" (or impure portions of the distillate separated from the pure spirit which have been conveyed into a feints receiver), and on the spirits made in the distillery; and is payable according to such of these methods of charge as produces the greatest amount of duty.<sup>4</sup> Accordingly, the duty may be charged on (a) the "attenuation" charge, calculated on the presumption that 1 gallon of proof spirit is produced from 100 gallons of wort or wash for every five degrees of difference between the highest gravity of the wort, as declared by the distiller or as found by the Excise Officer (whichever is the greater) without any allowance for waste or dregs, and the lowest gravity of the wash as found by the Excise Officer before distillation, (b) in respect of "low wines" on the quantity of proof spirit contained therein, less 5 per cent., or (c) in respect of "feints" on the quantity of proof spirits after deducting the feints, if any, remaining from a previous distillation and included in an account of feints and spirits last produced. In all these calculations an allowance for waste is made.<sup>5</sup>

**1018.** Excise duty on spirits is payable by the distiller within a prescribed period from the date on which the Excise Officer delivers to him a return shewing the amount of duty due. Failure to pay this duty within the period renders the distiller liable to a fine of £20 and a forfeit of double the duty.<sup>6</sup> The Excise Authority has power to distrain and sell all spirits, materials, and utensils in order to obtain payment of duty unpaid.<sup>7</sup>

**1019.** A distiller may, subject to statutory provisions and to regulations prescribed by the Commissioners, warehouse, without payment of duty, in his own warehouse, spirits distilled in his distillery.<sup>8</sup> Spirits may be delivered from a warehouse for home consumption after payment of duty.<sup>9</sup> On the delivery for home consumption from any warehouse of a cask of spirits which has been warehoused therein without payment of duty, the duty is to be charged and paid on the quantity of spirits contained in the cask at the time of delivery. If the quantity of spirits in the cask at the time of delivery is less than the quantity originally warehoused, then, unless the Commissioners are satisfied that the deficiency has not been caused by fraudulent abstraction, duty is to be charged and paid on the quantity warehoused, or on such

<sup>1</sup> 7 Edw. VII. c. 13, s. 4.

<sup>2</sup> 56 Geo. III. c. 28, s. 2.

<sup>3</sup> 5 & 6 Geo. V. c. 89, s. 19.

<sup>4</sup> 43 & 44 Vict. c. 24, s. 46 (1).

<sup>5</sup> *Ibid.*, s. 46.

<sup>6</sup> *Ibid.*, s. 47.

<sup>7</sup> *Ibid.*, s. 48.

<sup>8</sup> *Ibid.*, s. 56.

<sup>9</sup> *Ibid.*, s. 75.

portion thereof as the Commissioners direct.<sup>1</sup> The Commissioners may also require immediate payment of duty on the quantity of spirits originally warehoused in the cask if any deficiency beyond what is attributable to waste or natural causes is found.<sup>2</sup> Exemption from payment of duty is granted under certain conditions on spirits removed from warehouses for exportation,<sup>3</sup> for ships' stores,<sup>4</sup> for methylation, or for use in the arts and manufactures under the Finance Act, 1902, s. 8.<sup>5</sup>

**1020.** If spirits stored in an Excise warehouse are destroyed by fire or by the falling of the building, no duty is payable on them, and no claim can be brought against the Commissioners or their officers in respect of the spirits destroyed.<sup>6</sup> The chief provisions dealing with warehousing are to be found in the Spirit Act, 1880,<sup>7</sup> the Finance Act, 1896,<sup>8</sup> and the Revenue Act, 1903.<sup>9</sup>

**1021.** A rectifier may, subject to statutory provisions and to regulations issued by the Commissioners, warehouse on drawback in an Excise warehouse, for exportation or for ships' stores or for home consumption, British compounds certified as compounded by him from spirits on which duty has been paid, not being British liqueurs, tinctures, or medicinal spirits. He may also warehouse on drawback, but for exportation alone, British liqueurs, tinctures and medicinal spirits compounded by him from spirits on which duty has been paid. Finally, he may warehouse on drawback for exportation as ships' stores, but not for home consumption, spirits of wine rectified by him from spirits on which duty has been paid.<sup>10</sup>

**1022.** "Grogging," defined as the subjection of a cask to any process for the purpose of extracting any spirits absorbed in the wood thereof, is an offence punishable by a fine of £50. The spirits extracted by grogging are deemed to be spirits unlawfully kept or deposited within the meaning of the Spirits Act, 1880, and every cask which is being subjected to such a process or which, being upon premises upon which spirits so extracted are found, has been subjected to grogging, is subject to forfeiture.<sup>11</sup>

#### SUBSECTION (15).—*Sugar and Molasses.*

**1023.** Excise duties on sugar and molasses produced in the United Kingdom were first imposed by the Finance (No. 2) Act, 1915.<sup>12</sup> The duties on these articles, so far as manufactured from home-grown materials, were repealed by the Finance Act, 1922.<sup>13</sup> In 1925, in order to foster the home manufacture of beet sugar, the British Sugar (Sub-

<sup>1</sup> 43 & 44 Vict. c. 26, s. 76.

<sup>2</sup> *Ibid.*, s. 77 (1).

<sup>3</sup> *Ibid.*, s. 81.

<sup>4</sup> *Ibid.*, s. 82.

<sup>5</sup> *Ibid.*, s. 83; S.R. & O. 1906, No. 622, Pts. ii and iii; 17 & 18 Geo. V. c. 10, s. 15 (1).

<sup>6</sup> 43 & 44 Vict. c. 24, s. 55.

<sup>7</sup> *Ibid.*, ss. 49 to 85.

<sup>8</sup> 58 & 59 Vict. c. 16, s. 8.

<sup>9</sup> 3 Edw. VII. c. 46, s. 4.

<sup>10</sup> 43 & 44 Vict. c. 24, s. 95.

<sup>11</sup> 61 & 62 Vict. c. 10, s. 4.

<sup>12</sup> 5 & 6 Geo. V. c. 89, s. 7; and Sched. I. Pt. i.

<sup>13</sup> 12 & 13 Geo. V. c. 17, s. 6.

sidy) Act <sup>1</sup> was passed. That Act provides for the payment of a subsidy in respect of every hundredweight of sugar and molasses produced in the United Kingdom from home-grown beet, during a period of ten years from 1st October 1924, under certain conditions.<sup>2</sup> The Act further repealed the exemption from Excise duty of home-grown sugar and molasses which had been granted by the Finance Act, 1922, and provided that s. 5 of the Finance Act, 1924 <sup>3</sup> (which makes provision for the Excise duties to be charged, and the drawbacks and allowances to be allowed and paid in respect of home-produced sugar and molasses) should extend to these goods produced from home-grown beet.<sup>4</sup> The Act also provides that Part III. of the First Schedule to the Finance (No. 2) Act, 1915 <sup>5</sup> (which contains provisions relating to the Excise duties on sugar) as modified by the Third Schedule to the Act of 1925, should have effect as from the same date (1st October 1924).<sup>6</sup>

**1024.** The Finance Act, 1925, which extended the principle and operation of Imperial preference to sugar and molasses, provided that, for a period of ten years from 1st July 1925, there should be charged, in lieu of the existing duties on these goods, Excise duties equal to the preferential rates of the Customs duties for the time being chargeable on the like articles.<sup>7</sup> The existing regulations regarding Excise duties and drawback allowances are dealt with by the Finance Act, 1924,<sup>8</sup> the Finance (No. 2) Act, 1915,<sup>9</sup> and the British Sugar (Subsidy) Act, 1925.<sup>10</sup> In virtue of the powers conferred upon them under the Third Schedule of the British Sugar (Subsidy) Act, 1925,<sup>11</sup> the Commissioners of Customs and Excise have issued regulations imposing the conditions under which a sugar refiner may receive undutiable sugar or molasses at his bonded warehouse, and deliver therefrom without payment of duty a corresponding quantity of sugar or molasses.<sup>12</sup>

#### SUBSECTION (16).—*Sweets.*

**1025.** This expression signifies any liquor made from fruit and sugar, or from fruit and sugar mixed with any other material, which has undergone a process of fermentation in the manufacture thereof, and it includes British wines, made wines, mead, and metheglin.<sup>13</sup> The Commissioners are empowered to make regulations generally for securing and collecting the Excise duty on sweets, and by these regulations to apply to the duty the provisions of any enactments relating to the duty on beer, and for relieving from duty sweets intended for exportation or shipment as stores or sent out to the premises of another maker of sweets for sale.<sup>14</sup> Persons contravening or failing to comply with any regulation made by the

<sup>1</sup> 15 Geo. V. c. 12.

<sup>2</sup> *Ibid.*, ss. 1-3.

<sup>3</sup> 14 & 15 Geo. V. c. 21.

<sup>4</sup> 15 Geo. V. c. 12, s. 4 (1).

<sup>5</sup> 5 & 6 Geo. V. c. 89.

<sup>6</sup> 15 Geo. V. c. 12, s. 4 (2).

<sup>7</sup> 15 & 16 Geo. V. c. 36, s. 8 (2).

<sup>8</sup> 14 & 15 Geo. V. c. 21, s. 5; and First Sched., Pts. ii. and iii.

<sup>9</sup> 5 & 6 Geo. V. c. 89, First Sched., Pt. iii.

<sup>10</sup> 15 Geo. V. c. 12, s. 4; and Sched. III.

<sup>11</sup> 15 Geo. V. c. 12.

<sup>12</sup> S.R. & O. 1925, No. 1410, Pt. ii.

<sup>13</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 52.

<sup>14</sup> 17 & 18 Geo. V. c. 10, s. 6 (1).



Commissioners are liable to forfeiture of the goods in respect of which the offence is committed, and to a penalty of £50 in respect of each offence.<sup>1</sup> The present rate of duty is 1s. for every gallon of sweets sent out from the premises of a maker of sweets.<sup>2</sup>

#### SUBSECTION (17).—*Tobacco.*

**1026.** This Excise duty is levied upon tobacco grown in the United Kingdom by persons licensed to grow, cultivate, and cure tobacco. The growing of tobacco in Scotland was prohibited until 1908, when, under the Tobacco Growing (Scotland) Act<sup>3</sup> it was permitted. Subsequently, the Finance (1909–10) Act, 1910<sup>4</sup> rescinded all prohibitions and restraints upon the growth, making, or curing of tobacco in Scotland as from 1st January 1910. The present duties and the rates of drawbacks on tobacco are to be found in Part II. of the Second Schedule to the Finance Act, 1927.<sup>5</sup>

**1027.** The Commissioners of Customs and Excise may make regulations generally for securing and collecting the Excise duties on tobacco, and may by such regulations apply any provisions of the law of Excise and any provision of the Manufactured Tobacco Act, 1863,<sup>6</sup> or any Act amending the same.<sup>7</sup> In pursuance of their powers the Commissioners issued regulations in 1911.<sup>8</sup> Under these regulations, the duty is chargeable as soon as the tobacco is in a fit state for use by a manufacturer of tobacco, and an account of the tobacco is then to be taken. Any deficiency unaccounted for by a legitimate cause in the weight then ascertained as compared with the weight ascertained on the preliminary weighing shall, subject to any allowance for loss of weight during the process of curing allowed by the Commissioners, be deemed to be the weight of the tobacco chargeable with duty.<sup>9</sup> The tobacco is to be finally weighed and packed in presence of the Excise officer not later than the thirtieth day of June in the year following that in which it was grown, and shall thereafter be taken immediately to a bonded warehouse or to a ship for exportation, or, after payment of the duty, to the entered premises of a manufacturer of tobacco.<sup>10</sup>

**1028.** Home-produced tobacco, grown by a licensed person for the purpose of obtaining an extract therefrom for the manufacture of insecticides or sheep dip, or for other purely agricultural or horticultural purposes, is exempted from duty.<sup>11</sup> The tobacco grown for such purposes must be grown and dealt with in conformity with regulations issued by the Commissioners.<sup>12</sup>

<sup>1</sup> 17 & 18 Geo. V. c. 10, s. 6 (3).

<sup>2</sup> *Ibid.*, s. 6 (1).

<sup>3</sup> 8 Edw. VII. c. 10.

<sup>4</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 83 (5).

<sup>5</sup> 17 & 18 Geo. V. c. 10.

<sup>6</sup> 26 & 27 Vict. c. 7.

<sup>7</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 83 (4); 8 Edw. VII. c. 16, s. 3 (2).

<sup>8</sup> S.R. & O. 1911, No. 49.

<sup>9</sup> *Ibid.*, r. 8.

<sup>10</sup> *Ibid.*, r. 16.

<sup>11</sup> 2 & 3 Geo. V. c. 8, s. 4.

<sup>12</sup> S.R. & O. 1913, No. 173.

## SECTION 4.—EXCISE LICENCES.

SUBSECTION (1).—*General and Introductory.*

**1029.** The Acts relating to Excise licences and the duties thereon were in 1825 consolidated by the Excise Licences Act <sup>1</sup> under the provisions of which most licences are still granted.

**1030.** As a preliminary to obtaining an Excise licence a trader, who for the purposes of his business requires such a licence, must apply to the Commissioners of Customs and Excise or their representative, and for that purpose must “make entry” by delivering to the Excise Supervisor or Surveyor of his district a statement (in a form prescribed by statute) of the particulars of his premises, and of the vessels and utensils used in his trade, under a penalty of £200 on failure so to do,<sup>2</sup> and forfeiture of all goods found in unentered buildings and vessels.<sup>3</sup> The premises and vessels must be distinguished in the entry form by particular numbers,<sup>4</sup> No such entry is deemed to be legal unless made by and in the name of a person twenty-one years of age who is the real owner of the trade or business. A person who acts as the visible owner of such trade or business, or the person by whom the premises are occupied or used, or who has the principal management thereof, is made subject to all the duties, penalties, and forfeitures to which the real owner would be liable under the Acts relating to Revenue and Excise.<sup>5</sup>

**1031.** By permission of the Commissioners a married woman whose husband has become incapable of carrying on his business may make entry subject to her becoming liable for all the penalties and forfeitures provided for under the Acts.<sup>6</sup> A Corporation may make entry. The entry is signed by the chairman, or by a director, or the secretary, who thereby renders himself liable to all penalties incurred by the corporation. The entry must be under the seal of the corporation, but an Excise entry is deemed to be under this seal if signed by a person authorised by the corporation under its seal.<sup>7</sup>

**1032.** During the currency of an entry no other entry is permitted to be made in respect of the same buildings or premises, and if such an entry is made it is held to be void. The Commissioners, however, may allow a fresh entry to be made if the trader who originally made entry has absconded or quitted the premises.<sup>8</sup> The buildings and utensils, as detailed in the entry form, must be used only for the purposes specified in that form,<sup>9</sup> and the premises may be entered by an Excise Officer for the purpose of inspecting the premises, utensils, and goods belonging to the business carried on.<sup>10</sup> The Commissioners have power to terminate the entry of any premises by delivering a written notice of a new entry

<sup>1</sup> 6 Geo. IV. c. 81.<sup>2</sup> 7 & 8 Geo. IV. c. 53, s. 33; 4 & 5 Will. IV. c. 51, s. 6.<sup>3</sup> 4 & 5 Vict. c. 20, s. 5.<sup>4</sup> 7 & 8 Geo. IV. c. 53, s. 21; 4 & 5 Will. IV. c. 51, s. 5.<sup>5</sup> 7 & 8 Geo. IV. c. 53, s. 20.<sup>6</sup> 4 & 5 Vict. c. 20, s. 7.<sup>7</sup> 61 & 62 Vict. c. 46, s. 15; 11 & 12 Geo. V. c. 32, s. 21.<sup>8</sup> 4 & 5 Will. IV. c. 51, ss. 8 and 9.<sup>9</sup> *Ibid.*, s. 7.<sup>10</sup> 7 & 8 Geo. IV. c. 53, s. 22.

to the holder of an existing entry, which after fourteen days from the date of the notice becomes void.<sup>1</sup>

**1033.** All licensed traders (except sellers of methylated spirits) must display signboards over their business premises. These signboards must shew the name of the licensee and set forth the fact that he is licensed to carry on the business for which he has obtained a licence. Failure to put up such a notice involves a penalty of £20.<sup>2</sup>

**1034.** In general, licences are granted by the Commissioners or by persons appointed by them for that purpose.<sup>3</sup> The licence must specify the purpose, trade, or business for which it is granted, and the true date of granting the licence. Further, except in the case of auctioneers, appraisers, and hawkers, the place at which the trade or business is to be carried on must also be specified.<sup>4</sup> Authority to carry on several trades in the same premises may be granted in one licence, except in the case of a licence issued to a brewer of beer other than a brewer of beer for sale.<sup>5</sup> Partners carrying on any business (except that of auctioneer, appraiser, or hawker<sup>6</sup>) in one set of premises only need not take out more than one licence in any one year.<sup>7</sup> A proportional part of the licence duty may be charged to beginners in business corresponding to the time of the year when they take out their licences,<sup>8</sup> but no person who has taken out one Excise licence for carrying on a trade, and who, after the expiry of his licence, takes out a new licence to carry on the same trade is considered to be a beginner in business, unless a period of two years has elapsed between the expiry of the first licence and the taking out of the new licence.<sup>9</sup> If twenty-one days' notice of intention to renew a licence to carry on certain trades prior to its expiry be given, the new licence will bear date from the date of such expiry; but where such notice is not given, the licence will bear date from the day of the date of the application for renewal of the licence.<sup>10</sup>

**1035.** On the death of a licence-holder, or on his removal from the premises, the licence may, by endorsement, be transferred to his executors, wife, or child, or to the assignee of a removing licence-holder who is in possession and occupation of the premises. The transferee must make a fresh entry of the premises. A transfer of a licence to sell beer or sweets in these circumstances is contingent upon the production of a certificate by a justice of the peace or magistrate approving of the transferee.<sup>11</sup> Where premises, in respect of which an Excise licence has been granted, are burned down or destroyed, the Commissioners may grant to the licensee a transfer of his licence to other premises.<sup>12</sup>

<sup>1</sup> 61 & 62 Vict. c. 46, s. 15.

<sup>2</sup> 6 Geo. IV. c. 81, s. 25; 10 Edw. VII. & 1 Geo. V. c. 24, s. 74.

<sup>3</sup> 6 Geo. IV. c. 81, s. 6; 12 & 13 Vict. c. 1, s. 16.

<sup>4</sup> 6 Geo. IV. c. 81, s. 7; 26 & 27 Vict. c. 33, s. 15; 44 & 45 Vict. c. 12, s. 15 (3); 47 & 48 Vict. c. 62, s. 12 (4); 53 & 54 Vict. c. 8, s. 9; 60 & 61 Vict. c. 24, s. 6 (1).

<sup>5</sup> 44 & 45 Vict. c. 12, s. 15 (2.)

<sup>6</sup> 46 Geo. III. c. 43, s. 5; 6 Geo. IV. c. 81, s. 7; 11 Geo. IV. & 1 Will. IV. c. 64, s. 10; 51 & 52 Vict. c. 33, s. 5.

<sup>7</sup> 6 Geo. IV. c. 81, s. 7.

<sup>8</sup> *Ibid.*, s. 17; 24 & 25 Vict. c. 91, s. 14.

<sup>9</sup> 6 Geo. IV. c. 81, s. 18.

<sup>10</sup> *Ibid.*, s. 16.

<sup>11</sup> *Ibid.*, s. 21.

<sup>12</sup> *Ibid.*, s. 11; 3 & 4 Vict. c. 61, s. 8.



**1036.** Repayment of a proportionate part of the licence duty paid may be allowed when the holder of a licence to carry on certain trades satisfies the Commissioners that the business for which the licence was granted has been permanently discontinued. When a justice's licence is required for the holding of an Excise licence, a proportionate repayment of the duty paid may be allowed where the justice's licence has expired prior to the expiry of the Excise licence for some reason other than a conviction of the licence-holder.<sup>1</sup>

**1037.** Statutory penalties are imposed upon unlicensed persons carrying on trades for which a licence is required;<sup>2</sup> upon occupiers of premises in certain circumstances consenting to breaches of the Excise Licences Act;<sup>3</sup> upon persons who contravene the terms of their licences, or who deal in or sell goods otherwise than as authorised by their licences;<sup>4</sup> upon persons (except *bona fide* travellers taking orders for duly licensed employers) soliciting, taking, or receiving goods for dealing in which an Excise licence is required, without themselves holding a licence;<sup>5</sup> and upon licensed traders failing to produce their licences for examination by an Excise Officer within a reasonable time after demand by the officer.<sup>6</sup>

#### SUBSECTION (2).—*Licences to Manufacture.*

##### (i) *Brewing.*

##### (a) *Brewing of Beer for Sale.*

**1038.** This Excise licence and the duty thereon has been dealt with in numerous Acts. The duty was originally imposed in 1784, and the distinction then made between brewers of light or table beer and brewers of strong ale was abolished in 1882.<sup>7</sup> In 1885<sup>8</sup> the old malt duty was also abolished and a duty on beer established in its place. Under the various statutes dealing with licences to manufacture beer, a brewer of beer for sale has been defined as any person who brews beer for the use of any other person at any place other than the premises of the person for whose use the beer shall be brewed, and any person licensed to deal in or retail beer.<sup>9</sup> Such a brewer must, under penalty, obtain an Excise licence,<sup>10</sup> which is obtainable only from the Commissioners of Customs and Excise, in whose option lies the grant or refusal of a licence. The licence authorises the manufacture and also the sale of the beer wholesale at the premises where it is manufactured and elsewhere by the manufacturer or his servant or agent, if the beer is supplied to the purchaser direct from the premises where it is produced.<sup>11</sup> Brewing carried on in unlicensed premises renders the brewer liable to a penalty of £500.<sup>12</sup>

<sup>1</sup> 5 & 6 Geo. V. c. 62, s. 3; 1 & 2 Geo. V. c. 48, s. 7.

<sup>2</sup> *Ibid.*, s. 27.

<sup>3</sup> 30 & 31 Vict. c. 90, s. 17.

<sup>4</sup> 25 & 26 Vict. c. 22.

<sup>5</sup> *Ibid.*, s. 9.

<sup>6</sup> 10 Edw. VII. & 1 Geo. V. c. 8, Sched. I. Scale A 2.

<sup>7</sup> 6 Geo. IV. c. 81, s. 26.

<sup>8</sup> 10 Edw. VII. c. 8, s. 50 (4).

<sup>9</sup> 6 Geo. IV. c. 81, s. 28.

<sup>10</sup> 43 & 44 Vict. c. 20, s. 11.

<sup>11</sup> *Ibid.*, s. 10 (3).

<sup>12</sup> *Ibid.*, s. 50 (1).

**1039.** Before commencing the operation of brewing, the brewer must make entry in the prescribed form of all premises, rooms, places, and vessels intended to be used by him in his business, specifying the purpose for which each of these is to be used, and the mark by which it is distinguished. When completed, the entry must be signed by the brewer and delivered to the proper officer.<sup>1</sup> If sugar is used in his brewing operations, the brewer must make special entry of a room in his premises for the purpose of storing the sugar.<sup>2</sup> He must also legibly mark with oil colours the vessels and rooms used or intended to be used by him in his business of brewing.<sup>3</sup>

**1040.** The brewer must keep in his licensed premises, subject to inspection by Excise Officers, an official book containing details of the constituents to be used in his next brewing, along with various other particulars, under a penalty of £100 on failure to keep such a book.<sup>4</sup> He must also provide sufficient and just scales to enable Excise Officers to take account of, weigh and check all liquids used or produced in brewing, and must give all necessary assistance to the officers.<sup>5</sup> An Excise Officer is empowered to enter at any time during the day, and with a police constable at any hour at night, a brewer's licensed premises to take an account of the materials used or to be used in brewing, and of the worts and beer produced.<sup>6</sup> He may also enter such premises to search for concealed pipes, conveyances or vessels, and may further enter any other house or premises in search of a receptacle into which these pipes may lead.<sup>7</sup>

**1041.** Brewers are prohibited from using in the manufacture of beer any substances or liquors which the Commissioners of the Treasury deem to be of a noxious or detrimental nature, or which, being a chemical or artificial extract or product, in their opinion would prejudicially affect the interests of the revenue. Lists of such prohibited ingredients are published from time to time in the *London Gazette*.<sup>8</sup> Brewers are also prohibited from adulterating beer or adding anything thereto (except finings for the purpose of clarification or anything authorised by the Commissioners of Customs and Excise) before the beer is delivered for consumption.<sup>9</sup>

(b) *Brewing of Beer not for Sale.*

**1042.** A brewer of beer not for sale is one who brews only for the use either of himself or of labourers employed by him in the actual course of their labour and employment.<sup>10</sup> The brewing must be carried on in premises occupied by himself, or, if the house occupied by him is of an annual value of not more than £10, on premises gratuitously lent to him for the purpose by another brewer of beer not for sale.<sup>11</sup> A

<sup>1</sup> 43 & 44 Vict. c. 20, s. 22; 7 & 8 Geo. IV. c. 52, ss. 20, 21; 4 & 5 Will. IV. c. 51, ss. 5-9; 4 & 5 Vict. c. 20, s. 7; 61 & 62 Vict. c. 46, s. 15.

<sup>2</sup> 48 & 49 Vict. c. 51, s. 7 (1).

<sup>5</sup> *Ibid.*, s. 28.

<sup>8</sup> 44 & 45 Vict. c. 12, s. 5 (1).

<sup>10</sup> 43 & 44 Vict. c. 20, s. 34 (1).

<sup>3</sup> 43 & 44 Vict. c. 20, s. 21.

<sup>6</sup> *Ibid.*, s. 29 (1).

<sup>9</sup> 48 & 49 Vict. c. 51, s. 8 (1).

<sup>11</sup> *Ibid.*, s. 34 (2).

<sup>4</sup> *Ibid.*, s. 20.

<sup>7</sup> *Ibid.*, s. 30.

brewer of beer not for sale must take out a licence, but if he occupies a house of an annual value of £8 or less, he may obtain, without payment of duty, a licence to brew a quantity not exceeding four bushels of malt or the equivalent thereof for his own use.<sup>1</sup> The present scale of duties on private brewers' licences depends upon whether the beer brewed is or is not chargeable with duty, and also on the annual value of the house occupied by the brewer.<sup>2</sup> The term "house," as occupied by a brewer of beer not for sale, means and includes a dwelling-house together with the offices, courts, yards, and gardens occupied therewith.<sup>3</sup> The annual value of the house is to be taken as (1) the inhabited house duty, if there is such a value applicable,<sup>4</sup> (2) failing house duty, the income-tax value, or (3) failing house duty and income-tax values, then the annual value as determined by the Commissioners of Customs and Excise in accordance with the Acts relating to Excise, but having regard in all cases to any decrease in the annual value resulting from any increase under the provisions of the Finance (1909-10) Act, 1910, in the licence duty.<sup>5</sup>

**1043.** A brewer of beer not for sale, if chargeable with duty on beer, must before commencing to brew fill up, on a form provided by the Excise Officer, particulars of the quantity of malt, corn, and sugar which he intends to use in the brewing, and this form when completed must be shewn to the Excise Officer on demand.<sup>6</sup> The Commissioners may, when they think fit, require the brewer to verify his entries in the form by a declaration to be made by him before a justice of the peace or an authorised officer.<sup>7</sup> A penalty of £500 is imposed upon unlicensed persons brewing beer not for sale where an Excise licence is required.<sup>8</sup>

(ii) *Glucose, Saccharine, and Invert Sugar.*

**1044.** Under the Finance Act, 1901,<sup>9</sup> an Excise duty was imposed upon licences to be taken out annually by a manufacturer of these goods. The present duty is £1.<sup>10</sup> A distiller or a rectifier of spirits keeping a still may not take out such a licence, being debarred from refining sugar upon their premises.<sup>11</sup> Under the powers conferred upon the Commissioners to make regulations prohibiting the manufacture of these articles except by persons holding a licence and having made entry, and for fixing the date of expiration of the licence, they issued such regulations in 1901 and 1904.<sup>12</sup> Persons manufacturing glucose or invert sugar or saccharine without a licence are liable to a penalty of £500.<sup>13</sup>

<sup>1</sup> 12 & 13 Geo. V. c. 17, s. 8.

<sup>2</sup> 9 & 10 Geo. V. c. 32, s. 6 (1).

<sup>3</sup> 44 & 45 Vict. c. 12, s. 15 (4).

<sup>4</sup> This duty is now repealed: Finance Act, 1924 (14 & 15 Geo. V. c. 21), s. 20.

<sup>5</sup> 1 & 2 Geo. V. c. 2, s. 8; 44 & 45 Vict. c. 12, s. 15 (5).

<sup>6</sup> 43 & 44 Vict. c. 20, s. 32.

<sup>7</sup> *Ibid.*, s. 33 (1).

<sup>8</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 49 (2).

<sup>9</sup> 1 Edw. VII. c. 7, s. 5 (1).

<sup>10</sup> 5 & 6 Geo. V. c. 89, s. 7 (1).

<sup>11</sup> 43 & 44 Vict. c. 24, ss. 11 (2) and 88.

<sup>12</sup> 1 Edw. VII. c. 7, s. 9; S.R. & O. 1901, No. 604; S.R. & O. 1904, No. 633.

<sup>13</sup> 1 Edw. VII. c. 7, ss. 8 and 9.



(iii) *Matches.*

**1045.** By the Finance (New Duties) Act, 1916,<sup>1</sup> the Commissioners of Customs and Excise were empowered to make regulations prohibiting the manufacture of matches except by persons having a licence and having made entry for the purpose, and for fixing the date of expiration of the licence; and by their regulations to apply to the Excise duty on matches, and to manufacturers of matches, any enactment relating to any duty of Excise. In 1916 the Commissioners issued regulations dealing with the manufacture of matches,<sup>2</sup> under which the manufacturer must take out a licence (which expires on 31st March of each year) in such form as the Commissioners may approve. The manufacture must be carried on in approved premises. The manufacturer must make entry of the premises and must provide a secure warehouse to the satisfaction of the Commissioners. The warehouse is to be open during certain hours only, except with the consent of the Commissioners. A packing book, in which is entered an account of all matches produced from day to day, and a stock book, in which are entered details of all matches packed in packages and cases in which they are to be warehoused or delivered, must be kept by the manufacturer.

(iv) *Medicine.*

**1046.** The Excise duty on licences to manufacture certain medicines, originally a stamp duty, was made a duty of Excise in 1864.<sup>3</sup> Every owner, proprietor, maker, and compounder of certain medicines and drugs must take out an annual licence which expires on the first day of September in each year.<sup>4</sup> A licence to manufacture is now charged with a duty of 5s.<sup>5</sup>

(v) *Motor Spirit.*

**1047.** A manufacturer of motor spirit must take out an annual licence to make spirits in premises which must have been approved by the Commissioners of Customs and Excise, and entered with the Officer of Excise before the licence is granted.<sup>6</sup> The term "manufacturer" includes refiners of motor spirit and persons otherwise preparing such spirit.<sup>7</sup> The licence, which authorises the use of a still used solely for the manufacture of motor spirit,<sup>8</sup> expires on the 31st day of May in each year. Excise duties on licences taken out by makers of motor spirits were abolished as from 17th May 1919.<sup>9</sup>

(vi) *Playing Cards.*

**1048.** This is an Excise duty payable on an annual licence by a manufacturer who is also a seller of playing cards.<sup>10</sup> The duty, which was

<sup>1</sup> 6 & 7 Geo. V. c. 11, s. 3 (4).

<sup>2</sup> S.R. & O. 1916, No. 548.

<sup>3</sup> 42 Geo. III. c. 56, s. 8; 44 Geo. III. c. 98, s. 2 and Sched. A.

<sup>4</sup> 38 & 39 Vict. c. 23, s. 8.

<sup>7</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 84 (7).

<sup>9</sup> 9 & 10 Geo. V. c. 32, s. 12 (1).

<sup>2</sup> 27 & 28 Vict. c. 56, s. 6.

<sup>6</sup> S.R. & O. 1910, rr. 3, 4.

<sup>8</sup> *Ibid.*, s. 84 (3).

<sup>10</sup> 25 & 26 Vict. c. 22, s. 1 and Sched. C.

made an Excise duty in 1908,<sup>1</sup> is £1. The statutory provisions relating to exportation and to shipment as ships' stores are to be found in the Revenue Act, 1862,<sup>2</sup> and the Finance Act, 1921.<sup>3</sup> Regulations dealing with the deposit of cards in bonded warehouses appear in the regulations issued by the Commissioners of Customs and Excise in 1922.<sup>4</sup>

(vii) *Silk (Artificial).*

**1049.** Under the Finance Act, 1925,<sup>5</sup> a manufacturer of artificial silk yarn must take out an Excise licence and pay the duty thereon. The Commissioners of Customs and Excise are empowered to make regulations prohibiting the manufacture of artificial silk yarn or waste except by persons holding a licence and having made entry for the purpose; for fixing the date of the expiration of the licence; and for regulating the manufacture of any such yarn or waste and the delivery thereof from the factory.<sup>6</sup> Failure to observe the statutory provisions or the Commissioners' regulations renders an offender liable to a penalty of £50 for each offence.<sup>7</sup>

(viii) *Distilling, Rectifying and Compounding of Spirits, and Methylated Spirits Manufacture.*

**1050.** Under the Spirits Act, 1880, a licence must be taken out by persons, (a) having or using a still for distilling, rectifying or compounding spirits, or (b) brewing or making wort or wash, or distilling low feints or spirits, or (c) rectifying or compounding spirits.<sup>8</sup> Manufactures of spirits by any process other than distillation also require an Excise licence.<sup>9</sup> A penalty of £500 is imposed on persons carrying on these operations without obtaining a licence.<sup>10</sup> The duty on a distiller's licence is calculated on the number of gallons of proof spirit distilled during the year. The duty on a licence taken out by a rectifier or compounder of spirits is £15, 15s.<sup>11</sup>

(a) *Spirit Distilling.*

**1051.** A licence to keep a still of smaller capacity than 400 gallons is not granted unless the distiller has in use a still of that capacity, and produces to the Commissioners a certificate signed by three justices for the county or place that he is of good character, and fit and proper to be licensed to keep such a still, and that the premises in which he proposes to erect the still, and of which he is in actual possession, are of a yearly value of at least £10. The Commissioners may refuse to grant the licence, but must then state the grounds of refusal in writing,

<sup>1</sup> 8 Edw. VII. c. 16, s. 4 (1).

<sup>2</sup> 11 & 12 Geo. V. c. 32, s. 13.

<sup>3</sup> 15 & 16 Geo. V. c. 36, s. 5 (2).

<sup>4</sup> 43 & 44 Vict. c. 24, s. 5.

<sup>5</sup> 43 & 44 Vict. c. 24, s. 5 (2); 10 Edw. VII. & 1 Geo. V. c. 8, s. 50 (1).

<sup>6</sup> *Ibid.*, 1st Sched.

<sup>7</sup> 25 & 26 Vict. c. 22.

<sup>8</sup> S.R. & O. 1922, No. 416.

<sup>9</sup> *Ibid.*, s. 5 (3).

<sup>10</sup> 11 & 12 Geo. V. c. 32, s. 14 (4).

<sup>11</sup> *Ibid.*, s. 5 (4).

signed by them, to the justices.<sup>1</sup> A person is not to be entitled to a licence for, or be permitted to make entry of, a distillery, unless it is situate in or within a quarter of a mile of a market town,<sup>2</sup> but the Commissioners may grant a licence for and permit entry of a distillery situate beyond these limits if the distiller provides approved lodgings for the Excise officers to be placed in charge of the distillery.<sup>3</sup> The distillery must not, however, be situate within a quarter of a mile of any premises entered or used for rectifying or compounding spirits, or for receiving or keeping spirits by a rectifier.<sup>4</sup>

**1052.** A distiller must not carry on in his premises the business of a brewer of beer, a maker of sweets or vinegar, a refiner of sugar, or a dealer in or retailer of wine,<sup>5</sup> nor must his premises be connected with premises used for the purpose of these businesses,<sup>6</sup> and the Commissioners may refuse to grant a licence for distilling spirits in any premises in which, from their situation with respect to premises used for rectifying or compounding spirits, or to a brewery or vinegar factory, they think it inexpedient to allow the distilling of spirits.<sup>7</sup> The distiller must provide an approved and properly secured store, which must be kept locked by the officer in charge of the distillery at all times except when he is in attendance. On failure of the distiller to provide such a store, the Commissioners may, until it is so provided and secured, refuse to grant him a licence or may suspend or revoke his licence.<sup>8</sup>

**1053.** Every distiller must observe the rules contained in the First Schedule to the Spirits Act, 1880. These rules deal *inter alia* with the vessels to be erected by a distiller before making entry.<sup>9</sup> Any additions to vessels, utensils, or pipes must be duly entered.<sup>10</sup> Entry of the vessels, utensils, fittings and places intended to be used must be made by the distiller before he begins to brew any wort. Entry is made by the distiller signing and delivering to the proper officer an account in prescribed form, giving particulars of his name and address, the situation of the premises to be entered, a true and particular description of every vessel and utensil intended to be used in the premises; either the number of gallons which every still, with its head, is capable of containing, or the number of gallons of wash per hour which every still is capable of distilling; the purpose for which each such vessel and utensil is intended to be used; every house, room and place in which any part of his business is to be carried on, or any spirits are to be kept; and the purpose for which each house, room or place is to be used.<sup>11</sup> Further in the account every vessel, utensil, house, room or place must be distinguished by the name and number painted thereon,<sup>12</sup> and none of these must be described in the account as intended to be used for more than one purpose.<sup>13</sup> A model, drawing or description, shewing the course, construction and use of all fixed pipes, and every place,

<sup>1</sup> 43 & 44 Vict. c. 24, s. 8.

<sup>2</sup> *Ibid.*, s. 9 (1).

<sup>3</sup> *Ibid.*, s. 9 (2), (3).

<sup>4</sup> *Ibid.*, s. 10 (1).

<sup>5</sup> *Ibid.*, s. 10 (2).

<sup>6</sup> *Ibid.*, s. 10 (3).

<sup>7</sup> *Ibid.*, s. 11 (4).

<sup>8</sup> *Ibid.*, s. 13.

<sup>9</sup> *Ibid.*, s. 14 (1); and 1st Sched.

<sup>10</sup> *Ibid.*, s. 15 (1).

<sup>11</sup> *Ibid.*, s. 19 (1).

<sup>12</sup> *Ibid.*, s. 19 (2).

<sup>13</sup> *Ibid.*, s. 19 (3).



vessel or utensil connected with such pipes, must be produced with the account.<sup>1</sup> An entry must not be withdrawn whilst there remains in any place mentioned therein any still, or in any place, vessel, or utensil mentioned therein any materials preparing or fit for distillation, or any spirits liable to duty.<sup>2</sup>

**1054.** The processes of brewing, mashing, and distilling are carried on under the supervision of the Officer of Excise, to whom written notice must be given by the distiller of his intention to carry out such operations.<sup>3</sup> The distiller must deliver to the Excise Officer in charge a written declaration as to worts collected,<sup>4</sup> and at the end of every distilling period must hand to him a return shewing the quantity of each kind of material used, the quantity of wort or wash decreased or distilled during the period, the quantity of spirits computed at proof produced during the period, and the quantity of feints remaining at the end of the period.<sup>5</sup>

(b) *Rectifying or Compounding of Spirits.*

**1055.** The Spirits Act, 1880, applies to rectifiers the rules relating to vessels and utensils, and making entry applicable to distillers under the Act.<sup>6</sup> A rectifier's premises must not be situated less than a quarter of a mile from a distillery,<sup>7</sup> and the Commissioners may refuse to grant a licence for rectifying or compounding spirits on any premises in which, from their situation with respect to a distillery, they think it inexpedient to allow such business to be carried on.<sup>8</sup>

**1056.** A rectifier keeping a still is prohibited from carrying on in his premises the business of a brewer of beer, maker of sweets or vinegar, refiner of sugar, or a dealer in or retailer of wine,<sup>9</sup> nor must his premises be connected with premises in which any of these trades is carried on.<sup>10</sup> He must not have in his possession any materials capable of being distilled into low wines or spirits, nor may he distil or extract low wines or spirits from any materials except spirits, nor have in his possession any spirits for which he has not received and delivered to the proper officer a permit or certificate, nor any foreign spirits, except for the purpose of being rectified or compounded by him as spirits of wine or as British compounds. Contravention of these prohibitions involves a fine, and on a second conviction the licence becomes void and the rectifier, for a period of three years from the date of the conviction, is declared incapable of holding a rectifier's licence.<sup>11</sup>

**1057.** On receipt of any spirits the rectifier must give notice to the proper officer and deliver to him the permit or certificate received with the spirits, and, unless the officer neglects to attend within one hour after receiving the notice, the rectifier must not, until the officer has taken account of the spirits received, break bulk or draw off any part of the

<sup>1</sup> 43 & 44 Vict. c. 24, s. 19 (4).

<sup>2</sup> *Ibid.*, s. 20.

<sup>3</sup> *Ibid.*, ss. 26 (1), 27, 38 (1).

<sup>4</sup> *Ibid.*, s. 28.

<sup>5</sup> *Ibid.*, s. 39.

<sup>6</sup> *Ibid.*, s. 86; and 1st Sched.

<sup>7</sup> *Ibid.*, s. 87 (1).

<sup>8</sup> *Ibid.*, s. 88 (4).

<sup>9</sup> *Ibid.*, s. 88 (1).

<sup>10</sup> *Ibid.*, s. 88 (2).

<sup>11</sup> *Ibid.*, s. 89.

spirits, or add water or anything thereto.<sup>1</sup> A rectifier must not send out any spirits except British compounds and spirits of wine, and must not send out such compounds and spirits in less quantity than two gallons.<sup>2</sup> An account of the quantity and strength of the spirits in the stock of a rectifier is taken by the Excise Officer, and if, on balancing the stock, any excess or any deficiency over five per cent. is found, the rectifier is liable to a penalty.<sup>3</sup> Rectifiers are subject to certain statutory rules and regulations, contravention of any of which involves statutory penalties.<sup>4</sup>

**1058.** Rectifiers may, subject to statutory provisions and prescribed regulations, warehouse on drawback British compounds rectified or compounded by them from spirits on which duty has been paid.<sup>5</sup>

(c) *Methylated Spirits Manufacture.*

**1059.** Methylated spirits may be produced only by distillers or rectifiers if so authorised by the Commissioners or by persons licensed to methylate.<sup>6</sup> The expression "methylated spirits" was first defined in the Spirits Act, 1880,<sup>7</sup> and is now interpreted to mean spirits methylated in accordance with the provisions of the Finance Act, 1924.<sup>8</sup> A licence is required for the manufacture of such spirits, which must be carried out in a building or room approved by the Commissioners, in a warehouse provided for the purpose by them, or in an Excise warehouse, with their permission.<sup>9</sup>

**1060.** The ingredients for and the method of the process of methylation are laid down by statute, which also provides that the quantity of spirits used for methylation at any one time shall not be less than 450 gallons of British spirits, or, in the case of foreign spirits, the contents of the cask in which the spirits are imported.<sup>10</sup> Unlicensed makers of this spirit are liable to a penalty of £50.<sup>11</sup> A stock account of all proof spirits methylated or received by an authorised methylator must be kept by the Excise Officer,<sup>12</sup> and the methylator must keep separate accounts of any industrial methylated spirits and of any mineralised methylated spirits prepared or received by him, and of the sale, use, and delivery thereof.<sup>13</sup>

**1061.** Acting on the statutory powers vested in them, the Commissioners in 1906 issued regulations under which a maker of methylated spirits can remove the spirits for the purpose of export in quantities of not less than 10 gallons.<sup>14</sup> The maker can also supply the spirits to any one person in quantities of not less than 5 gallons,<sup>15</sup> provided that the purchaser is authorised to receive methylated spirits and sends with his

<sup>1</sup> 43 & 44 Vict. c. 24, s. 90 (1), (2).

<sup>2</sup> *Ibid.*, s. 93.

<sup>3</sup> *Ibid.*, s. 94.

<sup>4</sup> *Ibid.*, s. 91 and 3rd Sched.

<sup>5</sup> *Ibid.*, s. 95.

<sup>6</sup> *Ibid.*, s. 118.

<sup>7</sup> *Ibid.*, s. 3.

<sup>8</sup> 14 & 15 Geo. V. c. 21, s. 13 (4).

<sup>9</sup> 43 & 44 Vict. c. 24, s. 122.

<sup>10</sup> *Ibid.*, s. 123; 53 & 54 Vict. c. 8, s. 32; 14 & 15 Geo. V. c. 21, s. 13 (1); S.R. & O. 1925, No. 1240.

<sup>11</sup> 52 & 53 Vict. c. 42, s. 27 (3).

<sup>12</sup> 43 & 44 Vict. c. 24, s. 125 (1).

<sup>13</sup> 6 Edw. VII. c. 20, s. 2 (4); S.R. & O. 1925, No. 1240.

<sup>14</sup> S.R. & O. 1906, No. 622.

<sup>15</sup> 53 & 54 Vict. c. 8, s. 32 (2).

order on a requisition order in prescribed form, a certificate signed by the proper officer that he is an authorised purchaser.<sup>1</sup> The duty on a licence for the manufacture of methylated spirit is at present ten guineas.<sup>2</sup>

(ix) *Sweets.*

**1062.** Every manufacturer of sweets (liquor made from fruit and sugar, either alone or mixed with any other material, which has undergone a process of fermentation in the course of manufacture<sup>3</sup>) must take out a yearly licence, the present rate of which is £5: 5s.<sup>4</sup> In virtue of the statutory powers conferred upon them,<sup>5</sup> the Commissioners in 1912 and 1927 issued regulations dealing with entry of the premises and the manufacture of sweets.<sup>6</sup>

(x) *Tobacco.*

(a) *Tobacco Manufacture.*

**1063.** Tobacco and snuff manufacturers must obtain an annual licence, the rate of duty on which depends upon the amount of leaf or unmanufactured tobacco stalks and returns of tobacco shewn by the permits, and the entries in the official books kept by them<sup>7</sup> to have been brought in or received by them in the year previous to taking out such licences.<sup>8</sup> Every tobacco or snuff manufacturer must enter his premises with the Officer of Excise.<sup>9</sup> Leaf or unmanufactured tobacco may be received by a tobacco or snuff manufacturer only from a warehouse in which such tobacco has been deposited under the laws and regulations of the Revenue of Customs. The tobacco must be accompanied by a permit granted by the Excise Officer.<sup>10</sup> Tobacco stalks or returns of tobacco can also be received by the manufacturer in quantities of not less than 50 pounds weight, under certain statutory conditions.<sup>11</sup>

**1064.** Certain ingredients such as water, olive oil, and alkaline salts are permitted in the manufacture of tobacco and snuff. All other admixtures are illegal.<sup>12</sup> Moreover, manufacturers must not have in their possession sugar, treacle, molasses, honey, or certain other substances to be used, or capable of being used, as substitutes for, or to increase the weight of tobacco or snuff. Failure to observe this statutory provision involves a penalty of forfeiture of the ingredients and a fine of £200.<sup>13</sup> It is also a statutory offence to treat any vegetable or other matter to imitate tobacco or snuff, to or sell or deliver to any tobacco manufacturer any leaves, herbs, or plants, or any syrup, liquid, or preparation to be used in the manufacture of tobacco or snuff.<sup>14</sup> The

<sup>1</sup> 43 & 44 Vict. c. 24, s. 124 (4).

<sup>2</sup> 52 & 53 Vict. c. 42, s. 27 (1).

<sup>3</sup> 10 Edw. VII. c. 8, s. 52.

<sup>4</sup> 10 Edw. VII & 1 Geo. V. c. 8, 1st Sched. A.

<sup>5</sup> 1 & 2 Geo. V. c. 48, s. 10; 17 & 18 Geo. V. c. 10, s. 6 (2).

<sup>6</sup> S.R. & O. 1912, No. 1715; S.R. & O. 1927, No. 728.

<sup>7</sup> 3 & 4 Vict. c. 18, s. 8.

<sup>8</sup> 6 Geo. IV. c. 81, s. 2; 3 & 4 Vict. c. 17, s. 1; *ibid.*, c. 18, s. 9.

<sup>9</sup> *Ibid.*, s. 2; 30 & 31 Vict. c. 90, s. 8.

<sup>10</sup> 3 & 4 Vict. c. 18, s. 4.

<sup>11</sup> 5 & 6 Vict. c. 93, s. 10.

<sup>12</sup> *Ibid.*, ss. 1, 2, 4; 42 & 43 Vict. c. 21, s. 27.

<sup>13</sup> 5 & 6 Vict. c. 93, s. 5.

<sup>14</sup> *Ibid.*, s. 8.



amount of moisture<sup>1</sup> and of oil<sup>2</sup> in tobacco in the custody of a manufacturer of tobacco is restricted by statute to 32 per cent. and 4 per cent. respectively. The presence of a greater volume of moisture or oil is a statutory offence, punishable in either case by forfeiture of the tobacco and a fine of £50.

(b) *Tobacco Growing.*

**1065.** The Finance (1909–10) Act, 1910,<sup>3</sup> applied to Scotland the provisions of the Finance Act, 1908,<sup>4</sup> which gave the Commissioners power to prohibit the cultivation of tobacco except by persons holding a licence and having made entry for the purpose, and on land or premises approved by them. Regulations were accordingly issued by the Commissioners in 1911.<sup>5</sup> The present duty on the Excise licence is 5s. per annum.

(xi) *Vinegar Making.*

**1066.** An Excise licence must be taken out by every maker of vinegar or acetous acid for sale, and by every person who makes, prepares, extracts, distils, rectifies, or purifies any liquors prepared or capable of being used or applied to the purpose of vinegar or acetous acid made for sale.<sup>6</sup> This duty is at present £1.<sup>7</sup> Vinegar makers must make entry of their premises and utensils with the Excise.<sup>8</sup>

**1067.** Under the Spirits Act, 1880, the manufacture of vinegar must not be carried on in a distillery, or in the premises of a rectifier of spirits.<sup>9</sup> A distillery or a rectifier's premises must be separate and apart from premises used for making vinegar,<sup>10</sup> and the Commissioners may refuse to grant a licence for distilling or rectifying spirits in any premises if they are of opinion that the situation of the distillery or rectifier's premises with respect to premises used for vinegar manufacturing makes it inexpedient to allow the distilling or rectifying of spirits.<sup>11</sup> They may also refuse to grant a licence to make vinegar on similar grounds regarding a distillery.<sup>12</sup>

SUBSECTION (3).—*Excise Licences to carry on Trades and Businesses.*

(i) *Appraisers.*

**1068.** An appraiser is one who values or appraises any estate or property of any description, or any interest therein, for or in expectation of gain or reward.<sup>13</sup> An appraiser must, under a penalty of £50, take out an annual Excise licence,<sup>14</sup> the duty on which is £2.<sup>15</sup> The duty was made a local taxation duty by the Local Government (Scotland) Act,

<sup>1</sup> 4 Edw. VII. c. 7, s. 3 (2); 50 & 51 Vict. c. 15, s. 4.

<sup>2</sup> 63 & 64 Vict. c. 35, s. 1.

<sup>3</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 83 (2).

<sup>4</sup> 8 Edw. VII. c. 16, s. 3 (2).

<sup>5</sup> S.R. & O. 1911, No. 49.

<sup>6</sup> 6 Geo. IV. c. 81, s. 3; 7 & 8 Vict. c. 25, s. 2.

<sup>7</sup> 52 & 53 Vict. c. 7, s. 4.

<sup>8</sup> 7 & 8 Vict. c. 25, s. 3.

<sup>9</sup> 43 & 44 Vict. c. 24, ss. 11 (1) and 88 (1).

<sup>10</sup> *Ibid.*, ss. 11 (4) and 88 (4).

<sup>11</sup> *Ibid.*, s. 12.

<sup>12</sup> 8 & 9 Vict. c. 76, s. 1.

<sup>13</sup> 46 Geo. III. c. 43, s. 4.

<sup>14</sup> *Ibid.*, ss. 5, 6.

<sup>15</sup> 63 & 64 Vict. c. 35, s. 1.

<sup>16</sup> 8 Edw. VII. c. 16, s. 3 (2).

<sup>17</sup> 7 & 8 Vict. c. 25, s. 2.

<sup>18</sup> 7 & 8 Vict. c. 25, s. 3.

<sup>19</sup> *Ibid.*, ss. 11 (2) and 88 (2).

<sup>20</sup> *Ibid.*, s. 12.

<sup>21</sup> 8 & 9 Vict. c. 76, s. 1.

1889.<sup>1</sup> Licensed auctioneers and house-agents may act as appraisers without additional licence,<sup>2</sup> and licensed appraisers may act as house-agents.<sup>3</sup> An appraiser must, under a penalty of £50, write out his appraisal or valuation on duly stamped material within fourteen days after making it; and persons receiving an unstamped appraisal or valuation incur a penalty of £20.<sup>4</sup> Certain appraisements or valuations are, however, exempted from stamp duty, *e.g.* such as are made for the information of one party only, or for the purposes of ascertaining inventory or estate, or legacy or succession duty.<sup>5</sup>

(ii) *Auctioneers.*

**1069.** Every person who exercises or carries on the business of an auctioneer, or who acts in such capacity at any sale or roup, and every person who sells or offers for sale property of any description at any sale or roup where any person becomes the purchaser thereof by competition and being the highest bidder, either by being the single bidder, or increasing upon the biddings made by others, or by any other mode of sale by competition, is deemed to carry on the trade or business of an auctioneer,<sup>6</sup> and must take out an annual Excise licence,<sup>7</sup> the duty on which is £10.<sup>8</sup> The licence was made a local taxation licence by the Local Government (Scotland) Act, 1889.<sup>9</sup> Failure to take out a licence is punishable by a fine of £100.<sup>10</sup>

**1070.** A licensed auctioneer may act as an appraiser or house-agent without taking out an additional licence.<sup>11</sup> Under his licence he may sell by auction gold or silver plate or patent medicines.<sup>12</sup> He may also sell excisable property, but only in premises in respect of which the owners of such property shall have taken out, and shall have in force at the time of the sale thereof, the proper Excise licence of the sale of such commodities. A licensed auctioneer is, however, entitled to sell by auction by sample, in any town or place, any excisable property if the owner thereof is duly licensed for the sale of such property in the same town or place.<sup>13</sup> The auctioneer may, by authority of the Commissioners, sell such property by auction, where the Commissioners are satisfied that it belongs to a private person and is not sold for profit or by way of trade.<sup>14</sup>

**1071.** An auctioneer, before beginning any auction, must affix or suspend a ticket or board shewing his full name and address exhibited in large letters, so as to be conspicuously visible and legible, and must keep the ticket or board so displayed during the whole time of the auction. Failure to do this may involve a penalty of £20.<sup>15</sup> Duty on

<sup>1</sup> 52 & 53 Vict. c. 50, s. 20; and Schedule.

<sup>2</sup> 46 Geo. III. c. 43, s. 7; 8 & 9 Vict. c. 76, s. 1; 24 & 25 Vict. c. 21, s. 11.

<sup>3</sup> 24 & 25 Vict. c. 21, s. 13.

<sup>4</sup> 54 & 55 Vict. c. 39, s. 24 (1), (2).

<sup>5</sup> *Ibid.*, Schedule.

<sup>6</sup> 8 & 9 Vict. c. 15, s. 4.

<sup>7</sup> *Ibid.*, ss. 2, 4.

<sup>8</sup> *Ibid.*, s. 2.

<sup>9</sup> 52 & 53 Vict. c. 50, s. 20, and Schedule.

<sup>10</sup> 8 & 9 Vict. c. 15, s. 4.

<sup>11</sup> 46 Geo. III. c. 43, s. 7; 24 & 25 Vict. c. 21, s. 13.

<sup>12</sup> 8 & 9 Vict. c. 15, s. 6.

<sup>13</sup> 27 & 28 Vict. c. 56, s. 14.

<sup>14</sup> 8 & 9 Vict. c. 15, s. 7.

an Excise licence to auction is not payable in respect of any sale by auction by the Commissioners of Woods of property of any description belonging to the Crown.<sup>1</sup> In certain cases an auctioneer's licence is not required.<sup>2</sup>

(iii) *Beer Dealers and Retailers.*

See LICENSING (SCOTLAND) ACTS.

(iv) *Cards (Playing) Sellers.*

**1072.** The Excise licence for the sale of cards by one who is not a manufacturer thereof was repealed in 1870.<sup>3</sup> A licence to sell such cards is included in the manufacturer's licence.<sup>4</sup>

(v) *Cider and Perry Retailers.*

See LICENSING (SCOTLAND) ACTS.

(vi) *Game Dealers.*

**1073.** Two separate licences are required by game dealers—one from the justices of the peace and the other from the Excise. Prior to 1860 such licences were not required in Scotland, but the Game Licence Act, 1860,<sup>5</sup> makes applicable to Scotland the whole of the provisions of the Game Acts, 1831,<sup>6</sup> and 1839<sup>7</sup> with reference to licences and to dealing in and selling game.

**1074.** Under the existing legislation, the justices of the peace of any county, riding, division, liberty, franchise, city, or town may grant a licence to deal in game to any householder or keeper of a shop or stall within their division or district, not being an innkeeper or victualler or licensed to sell beer by retail, nor being the owner, guard, or driver of any mail coach or other vehicle employed in the conveyance of the mails or letters, or of any stage coach, stage waggon, van, or other public conveyance, nor being a carrier or higgler, nor being in the employment of any of the above-mentioned persons. Every person while so licensed must have affixed to some part of the outside of the front of his house, shop, or stall, a board having thereon in clear and legible characters his Christian name and surname, together with the words "Licensed to deal in game." Every such licence expires on the first day of July of each year.<sup>8</sup>

**1075.** The word "game" in connection with this provision, is defined as including hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.<sup>9</sup> There is no appeal against the refusal of the justices to grant a licence to deal in game.<sup>10</sup> Although an inn-

<sup>1</sup> 10 Geo. IV. c. 50, s. 78.

<sup>3</sup> *Ibid.*, s. 3.

<sup>5</sup> 23 & 24 Vict. c. 90, s. 13.

<sup>7</sup> 2 & 3 Vict. c. 35.

<sup>9</sup> 1 & 2 Will. IV. c. 32, s. 2.

<sup>2</sup> 8 & 9 Vict. c. 15, s. 5; 33 & 34 Vict. c. 32, s. 5.

<sup>4</sup> 25 & 26 Vict. c. 22.

<sup>6</sup> 1 & 2 Will. IV. c. 32.

<sup>8</sup> 1 & 2 Will. IV. c. 32, s. 18; 2 & 3 Vict. c. 35, s. 4.

<sup>10</sup> *Ibid.*, s. 18.



keeper cannot obtain a game dealer's licence, he may without a licence sell game for consumption in his house in the ordinary course of his business, always provided that he has acquired the game from some person qualified to sell the same to him.<sup>1</sup> If any person licensed to deal in game shall during the period of such licence be convicted of any offence whatever against the Act, his licence shall thereupon become null and void for the remainder of the period of its currency.<sup>2</sup> A partnership or company carrying on business at one place does not require to take out more than one licence, however many individuals may be interested in the concern.<sup>3</sup>

**1076.** After having obtained a licence from the justices, the dealer, before beginning business, must obtain an Excise licence. This is issued only on production of the licence obtained from the justices.<sup>4</sup> The duty is £2,<sup>5</sup> and it is under the control of the Inland Revenue Department,<sup>6</sup> who grant, sign and issue the licences.<sup>7</sup>

**1077.** Under the Game Licence Act, 1860,<sup>8</sup> a penalty of £20 is imposed upon any person who, having obtained a licence from the justices, shall deal in game without having an Excise licence. The Revenue Act of the following year provided that this penalty should be incurred by any person dealing in game without an Excise licence, whether or not he had obtained a licence from the justices.<sup>9</sup> Statutory penalties are also imposed upon persons who, not having a game licence or a licence to deal in game, sell game or offer it for sale; and on persons who, having a game licence but no licence to deal in game, offer game for sale to any person other than a licensed game dealer;<sup>10</sup> and also upon persons who, not being licensed game dealers, buy game from any person other than a licensed game dealer, or a person whom, by reason of his signboard, they have reasonable grounds for believing to be a licensed game dealer.<sup>11</sup> There is an exception as regards hares in favour of the occupier or person authorised by him to kill game under the Ground Game Act, 1880,<sup>12</sup> and also one in favour of a person authorised to sell game by an order of the Sheriff under the Poaching Prevention Act, 1862.<sup>13</sup>

**1078.** A penalty not exceeding £10, together with the costs of conviction, shall be incurred by—

- (1) Any licensed game dealer who shall buy game from a person not having a game licence or a licence to deal in game.
- (2) Any licensed game dealer who shall
  - (a) Neglect to affix the necessary signboard with the words "Licensed to deal in game" to his shop or stall;
  - (b) Affix such signboard to more than one shop or stall;
  - (c) Sell game at any place other than the shop or stall where the signboard is exhibited.

<sup>1</sup> 1 & 2 Will. IV. c. 32, s. 26.

<sup>4</sup> 23 & 24 Vict. c. 90, ss. 14 and 15.

<sup>7</sup> *Ibid.*, s. 16. <sup>8</sup> *Ibid.*, s. 14.

<sup>10</sup> 1 & 2 Will. IV. c. 32, s. 25.

<sup>12</sup> 43 & 44 Vict. c. 47, s. 4.

<sup>2</sup> *Ibid.*, s. 22.

<sup>3</sup> *Ibid.*, s. 21.

<sup>5</sup> *Ibid.*, s. 2.

<sup>6</sup> *Ibid.*, s. 3.

<sup>9</sup> 24 & 25 Vict. c. 91, s. 17.

<sup>11</sup> *Ibid.*, s. 27.

<sup>13</sup> 25 & 26 Vict. c. 114, s. 2.

- (3) Any person not being a licensed game dealer who shall pretend to be so by exhibiting any signboard, certificate, or otherwise.<sup>1</sup>

Sale by employees of a licensed dealer is sale by the licensed dealer. The penalties imposed by the Game Act, 1831,<sup>2</sup> the Game Licences Act, 1860,<sup>3</sup> and the Revenue (No. 2) Act, 1861,<sup>4</sup> are Excise penalties, and therefore a suspension of a conviction for dealing in game without a licence obtained in a prosecution before the justices is incompetent.<sup>5</sup>

**1079.** The Customs and Inland Revenue Act, 1893,<sup>6</sup> provides that the provisions of the Game Licence Act, 1860, as amended by the Revenue Act, 1861, relating to Excise licences to deal in game, and the dealing in and selling of game without an Excise licence, shall extend and apply to the dealing in and selling of hares, pheasants, partridges, grouse, heath, or moor game, black game, and bustards imported from foreign parts into Great Britain or Ireland. An Excise licence is therefore now required to deal in foreign game.

**1080.** The Game Acts apply to live game, whether wild or tame, as well as to dead, and dealers commit an offence if they buy live game from persons not qualified to sell game.<sup>7</sup> A licensed dealer or any other person who knowingly has in his premises or possession the eggs of any bird of game, or of any swan, wild duck, teal, or widgeon, wilfully taken out of the nest upon any land by a person not having the right to kill game upon such land, or not having permission from the person having such right, is liable to a penalty for every egg so found.<sup>8</sup>

#### (vii) *Hawkers.*

**1081.** A hawker means any person who travels with a horse or other beast bearing or drawing burden, and goes from place to place or to other men's houses carrying to sell or exposing goods for sale or samples of goods to be afterwards delivered. The definition includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells, or exposes for sale goods of any description in or at any house, shop, room, booth, or stall, or other place hired or used by him for that purpose.<sup>9</sup> A hawker must take out an annual Excise licence in such form as the Commissioners shall direct. It is issued only on payment in full of the duty, and expires on the 31st day of March in each year.<sup>10</sup> The present duty on such a licence is £2.<sup>11</sup> A hawker's licence was made a local taxation licence in 1889.<sup>12</sup>

**1082.** Hawker's licences need not be taken out (a) by any person selling or seeking orders for goods to and from persons who are dealers

<sup>1</sup> 1 & 2 Will. IV. c. 32, s. 28.

<sup>2</sup> *Ibid.*, c. 32.

<sup>3</sup> 23 & 24 Vict. c. 90.

<sup>4</sup> 24 & 25 Vict. c. 91.

<sup>5</sup> *Lazenby v. M'Arthur*, 1874, 3 Coup. 23; 2 R. (J.C.) 6.

<sup>6</sup> 56 & 57 Vict. c. 7, s. 2.

<sup>7</sup> 1 & 2 Will. IV. c. 32, s. 28; *Cook v. Trevenner*, [1911] 1 K.B. 9; *Harnett v. Miles*, 1884, 48 J.P. 455; *Loom v. Bailey*, 1860, 30 L.J. M.C. 31.

<sup>8</sup> 1 & 2 Will. IV. c. 32, s. 24.

<sup>9</sup> 51 & 52 Vict. c. 33, s. 2.

<sup>10</sup> *Ibid.*, s. 3 (2).

<sup>11</sup> *Ibid.*, s. 3 (1).

<sup>12</sup> 52 & 53 Vict. c. 50, s. 20; and Schedule.

therein, and who buy to sell again, (*b*) by the real worker or seller of goods of any description, and his children, apprentices, and servants usually residing in the same house with him, selling or seeking orders for goods made by such real worker or seller, (*c*) by any person selling fish, fruit, victuals, or coal, and (*d*) by any person selling or exposing for sale goods of any description in any public mart, market, or fair legally established.<sup>1</sup> Persons holding a hawker's licence only are prohibited under penalty from hawking spirits,<sup>2</sup> tobacco and snuff,<sup>3</sup> stamps,<sup>4</sup> or playing cards.<sup>5</sup> and from selling any article of gold weighing over 2 dwts. or of silver over 5 dwts. without holding a licence for dealing in plate.<sup>6</sup>

**1083.** A hawker's licence is not granted, except by way of renewal of a licence for the year immediately preceding, except on production of a certificate signed by a clergyman of the parish or place where the applicant resides, and by two householders of such parish or place, or by a justice of the peace for the county or place or superintendent or inspector of police for the district wherein the officer to whom application is made for the grant of a licence resides, attesting that such person is of good character and a proper person to be licensed as a hawker.<sup>7</sup> A hawker must have his name and the words "licensed hawker" legibly displayed upon all his boxes, vehicles, and salerooms and upon all handbills issued by him. He must not hire out or lend his licence to anyone, except his servant.<sup>8</sup> Penalties are imposed for contraventions of these regulations.<sup>9</sup>

**1084.** Statutory penalties are imposed upon forgers and counterfeiters of certificates and licences; <sup>10</sup> upon unlicensed persons using words purporting that they are licensed hawkers or trading with or under colour of licences granted to any persons other than their masters,<sup>11</sup> and for hawking without a licence or failing to produce a licence immediately upon demand.<sup>12</sup>

#### (viii) *House-Agents.*

**1085.** Every person, who as an agent for any other person for fee, gain, or reward, advertises for sale or letting any furnished house or part thereof or who, by public notice or advertisement, or by any inscription in or upon any house, shop, or place used or occupied by him holds himself out to the public as an agent for selling or letting furnished houses, and who sells or lets or in any way negotiates for the selling or letting of any furnished house or part thereof is deemed to be a house-agent.<sup>13</sup> A house-agent must take out a licence (which authorises him to act also as an appraiser), the duty on which is £2 per annum.<sup>14</sup> The licence is granted by the Commissioners of Inland Revenue, and expires on the 5th day of July in each year.<sup>15</sup> The provisions of the Act do not

<sup>1</sup> 51 & 52 Vict. c. 33, s. 3.

<sup>2</sup> 43 & 44 Vict. c. 24, s. 146.

<sup>3</sup> 5 & 6 Vict. c. 93, s. 13.

<sup>4</sup> 54 & 55 Vict. c. 38, s. 6.

<sup>5</sup> 25 & 26 Vict. c. 22, s. 31.

<sup>6</sup> 30 & 31 Vict. c. 90, s. 1; 51 & 52 Vict. c. 8, s. 9 (2).

<sup>7</sup> *Ibid.*, c. 33, s. 4 (1).

<sup>8</sup> *Ibid.*, s. 5 (1), (2).

<sup>9</sup> *Ibid.*, s. 5 (3).

<sup>10</sup> *Ibid.*, s. 4 (2).

<sup>11</sup> *Ibid.*, s. 5 (4).

<sup>12</sup> *Ibid.*, s. 6 (1).

<sup>13</sup> 24 & 25 Vict. c. 21, s. 10.

<sup>14</sup> *Ibid.*, Sched. B.

<sup>15</sup> *Ibid.*, s. 11.



extend to or require any agent employed in the management of landed estates, or any solicitor, writer to the signet, agent or procurator admitted to any court of law, or any conveyancer who has as such taken out his annual certificate, or any licensed auctioneer or appraiser, to take out a licence as a house-agent.<sup>1</sup>

(ix) *Medicine Sellers.*

**1086.** Every person vending, or exposing to sale, or keeping ready for sale any medicine liable to Excise duty, must take out an annual licence.<sup>2</sup>

A penalty of £20 is imposed upon persons selling such medicines without a licence.<sup>3</sup>

(x) *Methylated Spirit Dealers.*

See LICENSING (SCOTLAND) ACTS.

(xi) *Motor Spirit Retailers.*

**1087.** Every seller of motor spirits (except a manufacturer dealing in motor spirit made in his own factory) must take out an annual licence, if he retails the spirit in quantities of more than one pint at a time.<sup>4</sup> Entry of the premises must be made with the Officer of Excise before a licence is granted. The duty on a motor spirit dealers' licence was abolished as from 1st January 1921.<sup>5</sup>

(xii) *Occasional Licences.*

(a) *For Sale of Intoxicating Liquors.*

See LICENSING (SCOTLAND) ACTS.

(b) *For Sale of Tobacco.*

**1088.** Under the Revenue Act, 1864,<sup>6</sup> the Commissioners of Inland Revenue are empowered, whenever they consider it necessary for the accommodation of the public, to authorise any Officer of Excise to grant, upon payment of the duty, an occasional licence to any person duly licensed for the sale of tobacco or snuff. Every such occasional licence authorises the licensee to exercise and carry on his business of selling tobacco and snuff at any such place (other than the place for which his original licence was granted) and for and during such period, not exceeding three consecutive days at any one time, as the Commissioners approve and as specified in the occasional licence. Such a licence does not protect its holder in the carrying on of business under it unless it is produced on demand by an Excise or Police Officer. The duty upon an occasional licence to deal in or sell tobacco or snuff is 4d. for each and every day for which the licence is granted.<sup>7</sup>

<sup>1</sup> 24 & 25 Vict. c. 21, s. 13.

<sup>2</sup> 38 & 39 Vict. c. 23, s. 8; 44 Geo. III. c. 98.

<sup>3</sup> 42 Geo. III. c. 56, s. 9.

<sup>4</sup> 10 Edw. VII. & 1 Geo. V. c. 8, s. 84(2); S.R. & O. 1910, r. 2.

<sup>5</sup> 10 & 11 Geo. V. c. 18, ss. 12, 64; and Sched. IV.

<sup>6</sup> 27 & 28 Vict. c. 18, s. 5.

<sup>7</sup> *Ibid.*, Sched. B.

(xiii) *Passenger Vessels (Sale of Intoxicating Liquors).*

See LICENSING (SCOTLAND) ACTS.

(xiv) *Pawnbrokers.*

**1089.** The term “pawnbroker” is defined by the Pawnbrokers Act, 1872, as including every person who carries on the business of taking goods and chattels in pawn.<sup>1</sup> Every person who keeps a shop for the purchase of goods, or for taking in goods by way of security for money advanced thereon, and who purchases or receives or takes in goods and pays or advances or lends thereon any sum of money not exceeding £10 with or under an agreement or understanding, expressed or implied, or to be from the nature and character of the dealing reasonably inferred, that those goods may be afterwards redeemed or repurchased on any terms, is deemed to be carrying on the business of a pawnbroker.<sup>2</sup>

**1090.** The Pawnbrokers Act, 1872, applies (1) to every loan by a pawnbroker of 40s. or under, and (2) to every loan by a pawnbroker of above 40s. and not above £10, except in certain cases where a special contract respecting the terms of the loan (as authorised by the Act) is made between the pawner and the pawnbroker at the time of the pawning.<sup>3</sup> The Act does not apply to a loan by a pawnbroker of above £10, or to the pledge on which the loan is made, or to the pawnbroker or pawner in relation to the loan or pledge, and a person shall not be deemed a pawnbroker by reason only of his paying, advancing or lending on any terms, any sum or sums above £10.<sup>3</sup>

**1091.** A pawnbroker must take out an annual Excise licence from the Commissioners of Inland Revenue, the duty on which is £7, 10s. The licence expires on the 31st day of July in each year. A separate licence must be taken out and paid for by a pawnbroker for each pawnbroker’s shop kept by him.<sup>4</sup> Licences are granted only upon the production of a certificate given under the Act by justices of the peace for counties or districts, and by magistrates of burghs, at their respective meetings for granting and renewing certificates for the sale of excisable liquors.<sup>5</sup> The form of certificate is to be found in the Sixth Schedule (Part II.) to the Pawnbrokers Act, 1872. Penalties are imposed upon persons acting as pawnbrokers without a licence,<sup>6</sup> and upon persons forging a certificate or tendering it, knowing it to be forged.<sup>7</sup> If a pawnbroker is convicted on indictment of fraud in his business, or of knowingly receiving stolen goods, the Court before which he is convicted may direct that his licence shall cease to have effect.<sup>8</sup> See also PAWN-BROKING.

<sup>1</sup> 35 & 36 Vict. c. 93, s. 5.<sup>3</sup> *Ibid.*, s. 10.<sup>6</sup> *Ibid.*, ss. 39 and 56 (8).<sup>8</sup> *Ibid.*, s. 38.<sup>2</sup> *Ibid.*, s. 6.<sup>4</sup> *Ibid.*, s. 37.<sup>7</sup> *Ibid.*, s. 44.<sup>5</sup> *Ibid.*, s. 37.

(xv) *Plate Dealers.*

**1092.** The Plate (Scotland) Act, 1836,<sup>1</sup> regulates with microscopic minuteness of detail the standards of gold and silver which alone may be wrought or manufactured in Scotland; the intimation which each goldsmith, silversmith, or plate-worker must give to the Goldsmiths' Incorporation of Edinburgh or the Glasgow Goldsmiths' Company before he may commence business; the marks with which the articles are to be stamped; the assay which they must pass; and the penalties for forging or imitating the proper marks. As to marks on foreign plate, see the Hall-marking of Foreign Plate Act, 1904,<sup>2</sup> and as to foreign watch-cases, see the Assay of Imported Watch Cases Act, 1907.<sup>3</sup> By the Gold and Silver Wares Act, 1854,<sup>4</sup> there is substituted for the standard for gold wares a provision that Her Majesty may from time to time make an Order in Council allowing any standard for gold wares not less than one-third part in the whole. The silver standard prescribed in the Act of 1836, viz. 11 oz. 2 dwts, of fine silver in every pound weight troy, remains unchanged. The Act gives lists of the articles of gold and silver respectively which are exempt from being stamped.<sup>5</sup> Sections 23 and 25 and parts of sections 19 and 22 of this Act have been repealed by the Statute Law Revision Acts, but otherwise it remains in force.

**1093.** By the Revenue Act, 1867,<sup>6</sup> the following Excise duties on licences to deal in plate were imposed:—

Every person trading in or selling plate in respect of each place of business—

Where the gold is above 2 dwts. and under 2 oz. in weight, or the silver above 5 dwts. and under 30 oz. in weight, £2, 6s. per annum.

Where the gold shall be of the weight of 2 oz. and upwards, or the silver of the weight of 30 oz. and upwards, £5, 15s. per annum.

Hawkers and pedlars, the same duties per weight.

Pawnbrokers dealing in plate and refiners of gold and silver, for each place of business, £5, 15s. per annum.

Makers of watch-cases<sup>7</sup> and dealers in gold and silver lace<sup>8</sup> require a licence to deal in these articles.

**1094.** A goldsmith holding a licence at the lower rate of duty is liable to a penalty if he sells an article as gold which weighs more than 2 oz. although it does not contain 2 oz. of pure gold.<sup>9</sup> Any person trading in gold or silver plate without a licence is liable to a penalty of £50.<sup>10</sup> Two persons who had got up "watch clubs" and received commission from the licensed dealers on goods sold, were convicted of breach of the Act.<sup>11</sup>

<sup>1</sup> 6 & 7 Will. IV. c. 69.

<sup>4</sup> 17 & 18 Vict. c. 96, s. 1.

<sup>6</sup> 30 & 31 Vict. c. 90, ss. 1, 6.

<sup>8</sup> 30 & 31 Vict. c. 90, s. 4.

<sup>10</sup> 30 & 31 Vict. c. 90, s. 3.

<sup>2</sup> 4 Edw. VII. c. 6.

<sup>5</sup> 6 & 7 Will. IV. c. 69, ss. 16 and 17.

<sup>7</sup> 33 & 34 Vict. c. 32, s. 4.

<sup>9</sup> *Young v. Cook*, 1877, L.R. 3 Ex. D. 101.

<sup>11</sup> *Killick v. Graham*, [1896] 2 Q.B. 196.

<sup>3</sup> 7 Edw. VII. c. 8.



(xvi) *Railway Restaurant Cars (Sale of Intoxicating Liquors).*

(xvii) *Refreshment Rooms (Sale of Intoxicating Liquors).*

(xviii) *Spirits and Sweets Dealers.*

Spirit Dealers (Wholesale).

Spirit Retailers.

Still Users.

Sweets Dealers (Wholesale).

Sweets Retailers.

See LICENSING (SCOTLAND) ACTS.

(xix) *Tobacco Retailers.*

**1095.** An Excise duty on licence to sell tobacco and snuff was imposed by the Excise Licences Act, 1825,<sup>1</sup> and a penalty imposed upon persons selling or offering for sale these goods.<sup>2</sup> The duties were placed under the management of the Commissioners of Customs and Excise,<sup>3</sup> and the licences were made local taxation licences in 1889.<sup>4</sup> Under the Revenue Act, 1884,<sup>5</sup> a railway company may apply to the Commissioners of Inland Revenue for a licence to retail tobacco and snuff in any railway carriage of which they are the proprietors. The licence is granted upon payment, in respect of each carriage, of the Excise duty of 5s. 3d. It expires on the 5th day of July in each year. Similarly proprietors of omnibuses, tramway cars, or tramway carriages may apply for and obtain an Excise licence to sell tobacco in their vehicles.<sup>6</sup> The Excise licences of tobacco manufacturers enable them to sell their own manufactured tobacco at their entered factories without any retail licence. A passenger-vessel licence authorises the sale of tobacco as well as the sale of intoxicating liquor.<sup>7</sup>

(xx) *Wine Dealers (Wholesale).*

(xxi) *Wine Retailers.*

See LICENSING (SCOTLAND) ACTS.

## SECTION 5.—LOCAL TAXATION LICENCES.

### SUBSECTION (1).—*General.*

**1096.** These Excise licences, which, by the Local Government (Scotland) Act, 1889,<sup>8</sup> were constituted local taxation licences, comprise licences to use armorial bearings; to maintain and employ carriages

<sup>1</sup> 6 Geo. IV. c. 81, s. 2.      <sup>2</sup> *Ibid.*, s. 26.

<sup>3</sup> *Ibid.*, s. 2.

<sup>4</sup> 52 & 53 Vict. c. 50.      <sup>5</sup> 47 & 48 Vict. c. 62, s. 12.

<sup>6</sup> 60 & 61 Vict. c. 24, s. 6.

<sup>7</sup> 10 Edw. VII. & 1 Geo. V. c. 8; 1st Sched., D. 2.

<sup>8</sup> 52 & 53 Vict. c. 50, s. 20; and Schedule.

(including motor cars); and to employ male servants. Such licences are termed "establishment licences." Dog licences, gun licences, and licences to kill game are also included in the term "local taxation licences."

**1097.** Exemption from making any declaration with regard to, or taking out, an establishment licence is allowed in the case of (a) any member of the Royal Family, (b) representative Irish Peers, or Members of Parliament who are ordinarily resident in Ireland and not residing in Great Britain longer than during the session of Parliament, and forty days before and forty days after the session, and (c) persons ordinarily resident in Ireland, and residing in Great Britain by the order or direction of the Lord Lieutenant or of his chief secretary for the purpose of public business. Exemption from taking out a licence in respect of male servants and carriages employed or kept by him during his year of office is granted to the sheriff of any county, or mayor, or other officer in any corporation or royal burgh serving an annual office therein.<sup>1</sup>

#### SUBSECTION (2).—*Establishment Licences.*

##### (i) *Armorial Bearings.*

**1098.** A person who wears or uses armorial bearings must take out an annual licence and pay the duty thereon. If the armorial bearings are painted on or affixed to a carriage, the annual duty is two guineas; if they are otherwise used or worn, the duty is one guinea.<sup>2</sup> The term "armorial bearings" means and includes any armorial bearing, crest, or ensign, by whatever name the same is called, and whether registered in the college of arms or not.<sup>3</sup> Licences expire on 31st December of each year.<sup>4</sup> The applicant for a licence must fill up a prescribed form, and must pay the duty found to be due within twenty-one days from the date when he commences to wear or use any armorial bearing.<sup>5</sup> A person duly licensed by the proper authority to keep or use any public stage or hackney carriage does not require to take out a licence for any armorial bearings painted or marked on such carriage.<sup>6</sup> Statutory penalties are imposed upon any person using or wearing armorial bearings without a licence, or using or wearing them contrary to the terms of his licence.<sup>7</sup>

##### (ii) *Carriages.*

###### (a) *Motor Cars.*

See MOTOR CARS.

###### (b) *Other Vehicles.*

**1099.** An annual licence must be taken out by every person who keeps a carriage.<sup>8</sup> A person who lets a carriage for hire for less than one

<sup>1</sup> 32 & 33 Vict. c. 14, s. 19.

<sup>2</sup> *Ibid.*, s. 18.

<sup>3</sup> *Ibid.*, s. 19 (13).

<sup>4</sup> *Ibid.*, s. 18.

<sup>5</sup> *Ibid.*, s. 22.

<sup>6</sup> *Ibid.*, s. 19 (15).

<sup>7</sup> *Ibid.*, s. 27.

<sup>8</sup> *Ibid.*, s. 18; 51 & 52 Vict. c. 8, s. 4; 59 & 60 Vict. c. 36, s. 8; 10 Edw. VII. & 1 Geo. V. c. 8, s. 86.

year is deemed to be the person keeping the carriage, and must take out the licence; but if the carriage is let out on hire for more than a year, the hirer is considered to be the owner and must take out the licence.<sup>1</sup> A "carriage" means and includes a carriage (except a hackney carriage) drawn by a horse or mule, or horses or mules, but does not include a waggon, cart, or other such vehicle, constructed or adapted for use and used solely for the conveyance of any goods or burden in the course of trade or husbandry, and whereon the name and address or place of business of the owner are visibly and legibly painted in letters of not less than 1 inch in height.<sup>2</sup> A "hackney carriage" means any carriage standing or plying for hire, and includes any carriage let for hire by a coachmaker or other person whose trade or business it is to sell carriages or to let carriages for hire, provided that such carriage is not let for a period amounting to three months or more.<sup>2</sup> The amount of duty payable on the licence depends upon the number of wheels on the carriage, or upon the number of horses or mules by which it is adapted to be drawn.<sup>3</sup> The duty on a licence for a hackney carriage is at a fixed rate.<sup>3</sup> A penalty of £20 is imposed upon a person keeping a carriage without a licence.<sup>4</sup>

**1100.** Exemption from licence is granted in the following cases: (1) for a waggon or cart adapted and used solely for the conveyance of goods in the course of trade or husbandry, provided that the owner's name and address appear on the vehicle legibly in letters of not less than 1 inch in height,<sup>5</sup> (2) for a waggon or cart used for conveying the owner thereof or his family to church on Sunday, Christmas Day, Good Friday, or any day appointed for a public fast or thanksgiving, provided that the waggon or cart is otherwise used solely to convey burden in the course of husbandry and is marked with the owner's name and address,<sup>6</sup> (3) for any carriage used without payment or promise of payment for the conveyance of electors to and from the poll at an election.<sup>7</sup>

### (iii) *Male Servants.*

**1101.** By the Revenue Act, 1869, an Excise duty was imposed upon licences to employ male servants. The duty is a fixed duty of 15s. annually in respect of every such servant employed.<sup>8</sup> The term "male servant" means and includes any male servant employed either wholly or partially in certain capacities specified in the Act of 1869,<sup>9</sup> and now includes the driver of a motor car.<sup>10</sup> The person who furnishes a male servant on hire is regarded as the employer of the servant.<sup>11</sup> The term "male servant" does not include a servant, who, being *bona fide* employed in any capacity other than the capacities specified in the Act of 1869, is occasionally or partially employed in any of these capacities,

<sup>1</sup> 38 & 39 Vict. c. 23, s. 11.    <sup>2</sup> 51 & 52 Vict. c. 8, s. 4 (3).    <sup>3</sup> *Ibid.*, s. 4 (1).

<sup>4</sup> 32 & 33 Vict. c. 14, s. 27.    <sup>5</sup> 51 & 52 Vict. c. 8, s. 4 (3).    <sup>6</sup> 35 & 36 Vict. c. 20, s. 6.

<sup>7</sup> 46 & 47 Vict. c. 51, s. 14 (4).    <sup>8</sup> 32 & 33 Vict. c. 14, s. 18.    <sup>9</sup> *Ibid.*, s. 19 (3).

<sup>10</sup> 3 Edw. VII. c. 36, s. 13.

<sup>11</sup> 32 & 33 Vict. c. 14, s. 19 (4).



and does not include a person who has been *bona fide* engaged to serve his employer for a portion only of each day and does not reside in his employer's house.<sup>1</sup> A male servant, although employed in one of the capacities mentioned above, must for the purpose of the Excise duty charged by the Act of 1869 be employed in a personal, domestic, or menial capacity.<sup>2</sup> A statutory penalty of £20 may be exacted from a person who employs a male servant without a licence, or who employs a larger number of such servants than his licence allows him to employ.<sup>3</sup>

**1102.** Certain individuals are exempted from the necessity of taking out licences for male servants. They are (a) officers in the army or navy, in regard to any servant who is a soldier on the army or ship's rating, and who is employed by such officer in accordance with service regulations,<sup>4</sup> (b) licensed retailers of excisable liquors, or licensed keepers of refreshment houses, in regard to servants employed by them solely for the purpose of such businesses,<sup>5</sup> (c) persons who are licensed livery stable-keepers, in respect of a servant employed to drive a carriage with any horse let to hire for any period exceeding twenty-eight days, and (d) persons duly licensed to keep or use any public stage or hackney carriage, in respect of any servant necessarily employed by them to drive such stage or carriage.<sup>6</sup>

### SUBSECTION (3).—*Other Local Taxation Licences.*

#### (i) *Dogs.*

**1103.** Under the Dog Licences Act, 1867, every owner of a dog six months old or over must take out an annual licence.<sup>7</sup> The duty on the licence is 7s. 6d.<sup>8</sup> Licences expire on the thirty-first day of December in each year.<sup>9</sup> Every officer authorised to issue the licences must keep a register of all licences granted by him, in which are to be entered the name and address of every person licensed, and the number of dogs which each person is licensed to keep. A justice of the peace, or constable, may at any convenient time inspect the register of licences granted for the current year.<sup>10</sup> Every person in whose possession or in whose house any dog is found or seen is deemed to be the owner, unless the contrary is proved, and the owner or master of hounds is deemed to be the person keeping them.<sup>11</sup> A penalty of £5 is imposed upon a person keeping a dog without a licence, or keeping a larger number of dogs than his licence authorises him to keep.<sup>12</sup>

**1104.** An owner or master of hounds who has taken out proper licences for all the hounds entered in any pack kept by him need not take out a licence in respect of any hound under the age of twelve months which has never been entered in or used with any pack of

<sup>1</sup> 39 & 40 Vict. c. 16, s. 5.

<sup>2</sup> 32 & 33 Vict. c. 14, s. 27.

<sup>3</sup> 32 & 33 Vict. c. 14, s. 19 (5).

<sup>4</sup> 41 & 42 Vict. c. 15, s. 17.

<sup>5</sup> *Ibid.*, s. 8; 41 & 42 Vict. c. 15, s. 19.

<sup>6</sup> 11 & 12 Geo. V. c. 32, s. 10 (1).

<sup>7</sup> *Ibid.*; 36 & 37 Vict. c. 18, s. 4.

<sup>8</sup> 30 & 31 Vict. c. 5, ss. 3 and 10.

<sup>9</sup> 30 & 31 Vict. c. 5, s. 4.

<sup>10</sup> *Ibid.*, s. 6.

<sup>11</sup> 30 & 31 Vict. c. 5, s. 8.

hounds.<sup>1</sup> Exemption from taking out a licence is granted in the case of dogs kept and used solely by a blind person for his guidance.<sup>2</sup> In the case of shepherds' and farmers' dogs exemption is also granted under certain statutory conditions.<sup>3</sup> The owner must fill up and sign a declaration in a prescribed form, on delivery of which to the proper official he will receive a certificate of exemption from duty in respect of not more than two dogs.<sup>4</sup> A certificate of exemption may be obtained by a sheep farmer who owns more than four hundred sheep which feed on common or unenclosed ground.<sup>5</sup> The grant of the certificate of exemption now requires the previous consent of the Sheriff or Sheriff-Substitute having jurisdiction in the place where the dog is kept, and the procedure for obtaining that consent is regulated by Act of Sederunt.<sup>6</sup>

(ii) *Game, Licence to Kill.*

**1105.** The regulations with regard to licences to kill game are contained in the Game Laws Act, 1860,<sup>7</sup> as amended by the Inland Revenue Act, 1883.<sup>8</sup> The leading Act provides (s. 2) that the following licence duties shall be paid in respect of licences to take or to deal in game. For a licence in Great Britain, or a certificate in Ireland, to be taken out by every person who shall use any dog, gun, net, or other engine for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, or any deer; or shall take or kill, by any means whatever, or shall assist in any manner in the taking or killing, by any means whatever, of any game, or any woodcock, snipe, quail, or landrail, or any coney, or any deer, if such certificate shall be taken out after the 31st day of July<sup>9</sup> and before the 1st day of November—

To expire on the 31st day of July in the following year, £3.

To expire on the 31st day of October of the year in which the licence or certificate shall have been taken out, £2.

If such licence or certificate shall be taken out on or after the 1st day of November—

To expire on the 31st day of July following, £2.

Or if the licence be for any continuous period of fourteen days, to be specified in such licence or certificate,<sup>10</sup> £1.

Provided that any person having the right to kill game on any lands in England or Scotland shall be entitled to take out a licence to authorise any servant for whom he shall be chargeable to the duty of assessed taxes as a gamekeeper, to kill game upon the same lands upon payment of the duty of £2.

**1106.** The penalty (s. 4) for taking or pursuing game without the necessary licence is forfeiture of a sum of £20. A conviction for trespass

<sup>1</sup> 41 & 42 Vict. c. 15, s. 20.

<sup>2</sup> *Ibid.*, s. 21.

<sup>3</sup> *Ibid.*, s. 22.

<sup>4</sup> *Ibid.*, s. 22 (2).

<sup>5</sup> *Ibid.*, s. 22 (3).

<sup>6</sup> 6 Edw. VII. c. 32, s. 5 (1); A. of S., 22nd December 1906 (No. 968).

<sup>7</sup> 23 & 24 Vict. c. 90.

<sup>8</sup> 46 & 47 Vict. c. 10, ss. 4 and 5.

<sup>9</sup> *Ibid.*, s. 4.

<sup>10</sup> *Ibid.*, s. 5.

forfeits the licence in England and Scotland,<sup>1</sup> but not in Ireland. A game licence covers a gun licence, so that a person who takes out the former does not require also to take out the latter. The Act applies generally to all persons who take part in the pursuit of game, with or without successful capture, but certain exceptions and exemptions are expressly allowed.

**1107.** The exceptions are:

- (1) The taking of woodcock and snipe with nets or springes in Great Britain.
- (2) The taking or destroying of conies (rabbits) in Great Britain by the proprietor of any warren or of any enclosed ground whatever, or by the tenant of lands, either by himself or by his direction or permission.
- (3) The pursuing and killing of hares by coursing with greyhounds or by hunting with beagles or other hounds.
- (4) The pursuing and killing of deer by hunting with hounds.
- (5) The taking and killing of deer in any enclosed lands by the owner or occupier of such lands, or by his direction or permission.

**1108.** The exemptions are:

- (1) Any of the Royal Family.
- (2) Any person appointed a gamekeeper on behalf of His Majesty by the Commissioners of His Majesty's Woods and Forests.
- (3) Any person aiding or assisting in the taking or killing of any game, or any woodcock, snipe, quail, landrail, or coney, or any deer, in the company or presence, and for the use of, another person who shall have duly obtained, according to the directions of the Act, and in his own right, a licence to kill game, and who shall, by virtue of such licence, then and there use his own dog, gun, net, or other engine for the taking or killing of such game, woodcock, snipe, quail, landrail, coney, or deer, and who shall not act therein by virtue of any deputation or appointment.
- (4) And as regards the killing of hares only, all persons who, under the provisions of the two several Acts 11 & 12 Vict. c. 29 and 30 respectively, are authorised to kill hares in England and Scotland without obtaining an annual game certificate.<sup>2</sup>
- (5) As regards the killing of ground game, the occupier and the persons authorised by him under the Ground Game Act, 1880, are expressly exempted from obtaining a licence to kill game if the ground game is killed or taken on the land in the occupation of such occupier.<sup>3</sup>
- (6) In Scotland by the Game Laws Amendment (Scotland) Act, 1877,<sup>4</sup> any lessee, in actual occupation of land, having the

<sup>1</sup> 23 & 24 Vict. c. 90, s. 11.

<sup>3</sup> 43 & 44 Vict. c. 47, s. 4.

<sup>2</sup> *Ibid.*, s. 5.

<sup>4</sup> 40 & 41 Vict. c. 28, s. 8.



right to kill hares by himself, or any person authorised in writing by him, may kill hares without a game licence.

The third exemption relates to persons employed as beaters or game carriers. It will be observed that the assistance must be given to a licensed person using "his own dog, gun, net, or other engine." Accordingly, it has been said<sup>1</sup> that if a person goes out to shoot with a borrowed dog or gun, all the beaters accompanying him are liable to a penalty of £20 for taking game without a licence. Whether or not that be the proper construction of the section, it is unlikely that the Revenue Authorities will seek to enforce so extravagant a claim.

**1109.** As above mentioned, the amount of a gamekeeper's licence duty is £2. The licence belongs to the master, not to the man, and on a change of servant during the year the master may have the licence indorsed to the new man.<sup>2</sup> The licence qualifies the keeper to kill game only on his master's ground. Accordingly, a gamekeeper cannot, in virtue of his licence, kill game on a neighbouring proprietor's lands.

**1110.** If any person be found doing an act for which a game licence is required, his licence may be demanded by any officer of Inland Revenue, or by the lord of the barony, or gamekeeper, or a person having a game licence, or the owner, lessee, or occupier of the land on which the person is found. If the licence be not produced, and the person failing to produce it refuses to give his name and address, he is liable in a penalty of £20.<sup>3</sup> The penalty is not incurred by the mere refusal to produce the licence, unless the person also refuses to give his name and address.<sup>4</sup>

**1111.** Lists of licences are published by the Inland Revenue locally, in such manner as they find most expedient.<sup>5</sup> Game licences are available throughout the whole of the United Kingdom.<sup>6</sup>

### (iii) *Gun Licence.*

**1112.** By the Gun Licence Act, 1870, it is provided that there shall be paid for and in respect of every licence to be taken out yearly by every person who shall use or carry a gun in the United Kingdom the sum of 10s.<sup>7</sup> "Gun" includes a firearm of any description, and an air-gun or any other kind of gun from which any shot, bullet, or other missile can be discharged.<sup>8</sup> It has been held in England that a pocket pistol comes under this definition.<sup>9</sup> The duty and licence is declared to be an Excise duty and licence,<sup>10</sup> and probably therefore a private person has no right to prosecute for penalties under the Act. A penalty of £10 is imposed upon any person who shall use or carry a gun, elsewhere than in a dwelling-house or the curtilage (purlieu) thereof, without

<sup>1</sup> Oke, *Game Laws*, p. 55.

<sup>2</sup> 23 & 24 Vict. c. 90, s. 8.

<sup>3</sup> *Ibid.*, s. 10.

<sup>4</sup> *Molton v. Rogers*, 1802, 4 Esp. 215; *Lewis v. Taylor*, 1812, 16 East 49; *Scarth v. Gardiner*, 1831, 5 C. v P. 38; *Payne v. Hack*, 1894, 58 J.P. 165.

<sup>5</sup> 23 & 24 Vict. c. 90, s. 12.

<sup>6</sup> *Ibid.*, s. 18.

<sup>7</sup> 33 & 34 Vict. c. 57, s. 3.

<sup>8</sup> *Ibid.*, s. 2.

<sup>9</sup> *Campbell v. Hadley*, 1876, 40 J.P. 756; *Bryson v. Gamage, Ltd.*, [1907] 2 K.B. 630.

<sup>10</sup> 33 & 34 Vict. c. 57, s. 4.

having in force a licence under the Act.<sup>1</sup> Being an Excise penalty, this fine may be modified like other Excise penalties.

**1113.** Certain exemptions are recognised <sup>2</sup>—

- (1) A person carrying firearms in the performance of naval, military, or police duty.
- (2) A person having a game licence.
- (3) A servant carrying a gun by his master's order, for his master.
- (4) The occupier of any lands using a gun to scare birds or to destroy vermin, or any servant of the occupier using a gun for the like purpose, but in this latter case the occupier must himself have a licence. Rabbits are not vermin within the meaning of this section.<sup>3</sup> Rooks are vermin, and so probably are wood pigeons.
- (5) A gunsmith in his trade.
- (6) A carrier in his trade.

Where a gun is carried in parts by two or more persons in company, each and every one of such persons shall be deemed to carry the gun.<sup>4</sup>

**1114.** Provision is made for the summary apprehension and punishment of any person who, being found by an Inland Revenue Officer or a constable carrying a gun, fails to produce a licence and refuses to give his name and address.<sup>5</sup> Conviction of an offence under the Day Trespass Act infers forfeiture of the licence.<sup>6</sup> The licence, no matter whensoever taken out, expires on 31st July of each year.<sup>7</sup>

#### SECTION 6.—LEGAL PROCEEDINGS AND JURISDICTION.

**1115.** The same rules and principles of jurisdiction and procedure obtain as in the case of Custom duties. See CUSTOMS.<sup>8</sup>

<sup>1</sup> 33 & 34 Vict. c. 57, s. 5.

<sup>2</sup> *Ibid.*, s. 7.

<sup>3</sup> *Lord Advocate v. Young*, 1898, 25 R. 778; *Gosling v. Brown*, 1878, 5 R. 755.

<sup>4</sup> 33 & 34 Vict. c. 57, s. 7.

<sup>5</sup> *Ibid.*, s. 9.

<sup>6</sup> *Ibid.*, s. 11.

<sup>7</sup> 46 Vict. c. 10, s. 6.

<sup>8</sup> Vol. V. p. 384, *ante*.

## EXCLUSIVE TRADING.

*See* BURGH.

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## EXECUTION BY MESSENGER OR OTHER OFFICER.

*See* CITATION; DECREE; DILIGENCE OF CREDITORS.

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## EXECUTION OF DEEDS.

*See* DEEDS, EXECUTION OF.

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## EXECUTIVE GOVERNMENT.

*See* CONSTITUTIONAL LAW.



# EXECUTOR.

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## SECTION 1.—NATURE OF OFFICE.

**1116.** In the ordinary acceptance of the term, an executor is the person who has the legal title to uplift and ingather the moveable estate of a deceased person and to distribute it among those entitled to it. But the word “executors” is also used to include not only those who have been confirmed to the office of executor and have thus acquired a legal title, but also those who have a right to claim the office if they think proper; *e.g.* in the case of testate succession under the destination in a deed to “heirs, executors, and representatives whomsoever,”<sup>1</sup> or in the case of intestate succession the heirs *in mobilibus* of a deceased person, *i.e.* those entitled to succeed to his moveable estate under the Intestate Moveable Succession Act of 1855.<sup>2</sup>

**1117.** In early times, when testamentary deeds were usually conceived in the form of absolute dispositions, the whole moveable estate of the deceased passed to his executor, and there was nothing but his own sense of right to compel him to distribute it amongst the children or next of kin of the testator. To remedy abuses of the office which were then prevalent, an Act<sup>3</sup> was passed directing all executors, after payment of debts, to make count, reckoning, and payment of the goods and gear of a deceased person, intromitted with by them, to his wife, children, and nearest of kin, reserving to the executors the third of the deceased’s part, and it provided that if a legacy were left to an executor he should not be permitted to take both the legacy bequeathed to him and the third allowed by the Act. The executor’s right to the third was abolished by the Intestate Moveable Succession Act, 1855.<sup>4</sup> An executor, *qua* executor, now receives no benefit from

<sup>1</sup> Ersk. Inst. iii. 9, 1.

<sup>2</sup> 18 & 19 Vict. c. 23; *Nimmo v. Murray’s Trs.*, 1864, 2 M. 1144; *Stodart’s Trs.*, 1870, 8 M. 667; *Ewart v. Cottom*, 1870, 9 M. 232.

<sup>3</sup> 1617, c. 14, “Anent Executors.”

<sup>4</sup> 18 & 19 Vict. c. 23, s. 8; *Lowndes v. Douglas*, 1862, 24 D. 1391.

the estate of a deceased person as remuneration for his services. The office of executor is an administrative appointment and not a benefit. A widow who is appointed executrix under her husband's will is not bound to elect between accepting the office and claiming her legal rights.<sup>1</sup>

**1118.** The office of an executor is different from that of a trustee. The duty of an executor is to realise and distribute the estate of the deceased: that of a trustee, to hold and administer it for the purposes of the trust. But a testator usually appoints his trustees to be his executors, and the point at which the one office passes into the other is often very difficult to determine. Theoretically a trustee who is confirmed as executor should, as executor, realise the estate, pay the debts of the testator, and then convey the remainder of the estate to himself as trustee for administration according to the trust purposes. Where several trustees and executors are nominated by the testator it would be quite competent for one of them to be confirmed as executor, perform the duties of the executor, and then convey the estate to himself and his co-trustees for administration of the trust.<sup>2</sup> So narrow is the line between the offices that questions have arisen as to whether persons who are nominated executors without being nominated trustees are entitled to the advantages conferred upon trustees by the Trusts Acts. This is now settled by the Executors (Scotland) Act, 1900,<sup>3</sup> which provides that, unless the contrary is expressly provided in the trust deed, executors-nominate shall have all the powers, privileges, and immunities of gratuitous trustees, and by the Trusts (Scotland) Act, 1921,<sup>4</sup> which interprets "trustee" to include "executor-nominate."

## SECTION 2.—APPOINTMENT.

**1119.** An executor derives his authority either from his appointment by the deceased in his testament or from a decree of the commissary judge. In the former case he is called an executor-nominate; in the latter an executor-dative. If there is no executor-nominate or executor-dative on the estate of a deceased person, a creditor of the deceased, or in certain circumstances of his next of kin, may be confirmed as executor-creditor to so much of the estate as will enable him to make good his debt.

### SUBSECTION (1).—*Executor-nominate.*

**1120.** As above stated, an executor-nominate is appointed in a testamentary writing. Such an appointment is a usual but not a necessary part of a testamentary disposition. The appointment is personal to the executor and does not descend to his heirs. The nomination must be sufficiently clear to make the identification of the nominee possible. The

<sup>1</sup> *Smart v. Smart*, 1926 S.C. 392.

<sup>2</sup> *Orr Ewing's Trs. v. Orr Ewing*, 1885, 13 R. (H.L.) 1, per Lord Watson at p. 25.

<sup>3</sup> 63 & 64 Vict. c. 55, s. 2.

<sup>4</sup> 11 & 12 Geo. V. c. 58, s. 2.

use of the word "executor" is not indispensable.<sup>1</sup> An executor-nominate applies to the Sheriff as commissary judge for confirmation of his appointment, and lodges with his application an inventory of the whole moveable estate of which the deceased died possessed. He is not required to find caution. The confirmation, which is called a testament-testamentar, must be to the whole of the moveable estate of the deceased.

**1121.** Where no executor has been appointed by a testator, or where for any reason an appointment fails, the testamentary trustees of the testator, original or assumed, or appointed by the Court, and failing them any general disponee or universal legatary or residuary legatee appointed by the testator, are held to be his executors-nominate and entitled to confirmation in that character.<sup>2</sup> The assignee of a legatee is also entitled to the office if no one having a preferable title comes forward.<sup>3</sup> All executors-nominate, unless the contrary be expressly provided in the trust deed, have the same powers, privileges, and immunities, and are subject to the same limitations and restrictions, as gratuitous trustees.<sup>4</sup>

#### SUBSECTION (2).—*Executor-dative.*

**1122.** Where there is no executor-nominate, the law provides that the office of executor may be conferred upon certain persons. These persons may apply to the Sheriff as commissary judge to be decerned as executors-dative. They are entitled to the office in the following order: (1) the next of kin of the deceased taking a beneficial interest in the succession,<sup>5</sup> and the representatives of his next of kin who have died after the deceased but before confirmation is expedite;<sup>6</sup> (2) the relict; (3) the children or descendants of such persons as would have been next of kin had they survived the deceased but who have predeceased him;<sup>7</sup> (4) creditors of the deceased;<sup>8</sup> and (5) the procurator-fiscal of Court or a judicial factor. If the next of kin has no beneficial interest in the estate, his right to confirmation is postponed to that of anyone who has a better title.<sup>9</sup>

**1123.** The next of kin are those who would be entitled to succeed to the moveable estate of a deceased intestate, viz.: (1) children and their descendants; (2) brothers and sisters german and their descendants; (3) brothers and sisters consanguinean and their descendants; (4) the father;

<sup>1</sup> *Tod*, 1890, 18 R. 152; cf. *Jerdon v. Forrest*, 1897, 24 R. 395; *Lady Denman v. Torry*, 1899, 1 F. 881.

<sup>2</sup> Executors (Scotland) Act, 1900 (63 & 64 Vict. c. 55), s. 3.

<sup>3</sup> *Macpherson v. Macpherson*, 1855, 17 D. 358.

<sup>4</sup> Executors (Scotland) Act, 1900 (63 & 64 Vict. c. 55), s. 2; Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 2.

<sup>5</sup> *Lady Denman v. Torry*, 1899, 1 F. 881, per Lord Kinnear; *Stewart v. Kerr*, 1890, 17 R. 707; *Campbell v. Falconer*, 1892, 19 R. 563.

<sup>6</sup> 4 Geo. IV. c. 98, s. 1.

<sup>7</sup> 18 & 19 Vict. c. 23, s. 1.

<sup>8</sup> *Stewart v. Kerr*, *supra*, per Lord Rutherford Clark.

<sup>9</sup> *Bones v. Morrison*, 1866, 5 M. 240.



(5) the mother;<sup>1</sup> (6) brothers and sisters of the father, and so on. Any number of these in the same degree of relationship to the deceased may apply to be conjoined in the office. The Intestate Moveable Succession Act, 1855, provides that the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office.<sup>2</sup> By the same section it is declared that no representation shall be admitted among collaterals after brothers' and sisters' descendants. Brothers and sisters uterine are not next of kin, but they have an interest under the Intestate Moveable Succession Act, 1855, which will entitle them to be confirmed as executors in the absence of anyone having a better title.<sup>3</sup>

**1124.** The father of a deceased intestate, and after his death his representative, is, in virtue of the father's rights under the said Act, entitled to be conjoined in the office with the next of kin.<sup>4</sup> His mother, though not entitled to compete with the next of kin, may be decerned executrix in the absence of anyone having a preferable title.<sup>5</sup> Where an intestate is survived by a widow but leaves no issue and his estate does not exceed £500, his widow is entitled to be confirmed his sole executrix.<sup>6</sup> A husband who takes an interest in his predeceasing wife's moveable estate under the Married Women's Property Act, 1881,<sup>7</sup> has a right to confirmation as executor-dative, but this right is postponed to that of the next of kin.<sup>8</sup> The moveable estate of a deceased intestate vests *ipso jure* in his next of kin who survive him, even if they die before confirmation is expedited,<sup>9</sup> and the right thus vested can be assigned, giving the assignee a title to confirmation in conjunction with other next of kin.<sup>10</sup> Two or more persons who claim in different characters, but each of whom would separately be entitled to the office, may be conjoined as executors-dative.<sup>5</sup> Even a *curator bonis* or judicial factor whose ward has a beneficial interest in the estate may be decerned executor, and his appointment does not terminate on the attainment of majority by the ward.<sup>11</sup> Minors or even pupils may be appointed or decerned executors either alone or along with their tutors and curators.<sup>12</sup> It has been held that an alien enemy resident in Scotland and registered under the Aliens Restriction Act, 1914, and relative Order in Council

<sup>1</sup> 9 & 10 Geo. V. c. 61, s. 1.

<sup>2</sup> 18 & 19 Vict. c. 23, s. 1; *Dowie v. Barclay*, 1871, 9 M. 726.

<sup>3</sup> 18 & 19 Vict. c. 23, s. 5.

<sup>4</sup> *Ibid.*, s. 3; *Webster v. Shiress*, 1878, 6 R. 102.

<sup>5</sup> *Muir*, 1876, 4 R. 74.

<sup>6</sup> 9 Geo. V. c. 9, s. 3.

<sup>7</sup> 44 & 45 Vict. c. 21, s. 6.

<sup>8</sup> *Stewart v. Kerr*, 1890, 17 R. 707; *Campbell v. Falconer*, 1892, 19 R. 563.

<sup>9</sup> 4 Geo. IV. c. 98, s. 1.

<sup>10</sup> *Mann v. Thomas*, 1830, 8 S. 468; *Webster v. Shiress*, *supra*.

<sup>11</sup> *Johnstone's Exr. v. Dobie*, 1907 S.C. 31.

<sup>12</sup> *Reid v. Turner*, 1830, 8 S. 960; *Keith v. Archer*, 1836, 15 S. 116; *Johnstone v. Lowden*, 1838, 16 S. 541. But it is desirable in such cases that a commissary factor be appointed, see CONFIRMATION OF EXECUTORS, Vol. IV. *ante*, at p. 367.

might be appointed as executor-dative.<sup>1</sup> Where a subject of a foreign State dies in this country leaving no one here entitled to administer his estate, the consul of that State may apply for power of administration.<sup>2</sup>

**1125.** A person who claims the office of executor-dative applies first to the Sheriff for decerniture as executor-dative *qua* next of kin (or as the case may be), setting forth in his application the grounds of his claim. The Court in which the application is made is that of the Sheriffdom in which the deceased was domiciled, or, if he had no domicile in Scotland, or no fixed domicile, the Sheriff Court of Edinburgh as the *commune forum*. After decerniture, the executor applies for confirmation of his appointment, and, as in the case of an executor-nominate, lodges with his application an inventory of the whole moveable estate of the deceased. Differing from an executor-nominate, he must find caution, which is usually fixed at a sum not exceeding the value of the estate given up in the inventory, but which may, on cause shewn, be fixed at a lower sum. The confirmation in favour of an executor-dative is called a testament-dative.

#### SUBSECTION (3).—*Executor-creditor.*

**1126.** As above stated, if there is no executor-nominate or executor-dative on the estate of a deceased person, a creditor of the deceased may be confirmed as executor-creditor to so much of the estate as will enable him to make good his debt. Such confirmation can only be taken out by a creditor whose debt is constituted. If the debt is already constituted at the date of the debtor's death by writing or decree, the creditor may apply for decerniture and confirmation at once. The decree of an English Court constituting the debt is sufficient.<sup>3</sup> The confirmation, not the decerniture, vests the right to the estate in the executor-creditor.<sup>4</sup> Where the debt has not been constituted in the deceased's lifetime the creditor may charge the deceased's next of kin to confirm executor to him within twenty days after the charge has been given, and then the charger may proceed to have his debt constituted and the *hereditas jacens* of moveables declared liable by a decree *cognitionis causa*, upon obtaining which he may be decerned executor-dative to the deceased.<sup>5</sup> Where the creditor's claim is restricted to a decree *cognitionis causa tantum* the preliminary charge is unnecessary,<sup>6</sup> but if charged, the next of kin must either confirm or renounce.<sup>7</sup>

**1127.** An executor-creditor, unlike an executor-nominate or an executor-dative, need not expedite confirmation to the whole moveable estate of the deceased; his confirmation may be limited to the amount of his debt.<sup>8</sup> The oath required by the statute is given to the inventory made up, not to the debt.<sup>9</sup> He must, however, when applying for con-

<sup>1</sup> *Schulze*, 1917 S.C. 400.

<sup>3</sup> *Stiven v. Myer*, 1868, 6 M. 885.

<sup>5</sup> Act 1695, c. 41.

<sup>7</sup> *Davidson v. Clark*, 1867, 6 M. 151.

<sup>9</sup> *Greig v. Christie*, 1837, 15 S. 697.

<sup>2</sup> 24 & 25 Vict. c. 121, s. 4.

<sup>4</sup> *Willison v. Dewar*, 1840, 3 D. 273.

<sup>6</sup> *Forrest v. Forrest*, 1863, 1 M. 806.

<sup>8</sup> 4 Geo. IV. c. 98, s. 4.

firmation, give up an inventory of the whole estate for the purposes of stamp duties, but by limiting his confirmation to the amount of the debt due to him he limits his responsibility for the administration of the estate and the amount of caution which he must find. This is the only case in which partial confirmation is competent. Notice of the application for confirmation must be given in the *Edinburgh Gazette*, and anyone who has a preferable claim to be confirmed may lodge objections and exclude the creditor from the office. Any other creditor of the deceased who cannot find other estate to which he may be confirmed is entitled to be conjoined in the office with the first creditor. Where one creditor has been decerned joint executor-creditor with another, he is bound to concur in applying for confirmation.<sup>1</sup> There can be several confirmations to the same subject, either conjoined or successive.

**1128.** Confirmation as executor-creditor operates as a step of diligence, and its effect is to create a burden or *nexus* upon the subject confirmed, leaving that subject in the *hæreditas jacens* of the deceased debtor subject to the burden.<sup>2</sup> By Act of Sederunt of 28th February 1662 all creditors doing legal diligence within six months of the debtor's death are entitled to rank *pari passu* upon the estate. But creditors coming in late must bear a proportion of the expense incurred by the creditor first confirmed. Even on the expiry of the six months the executor, if he has notice of insolvency, is not entitled to pay to one creditor in preference to another of the same rank.<sup>3</sup>

**1129.** A confirmation as executor-creditor is preferable to an arrestment though the arrestment is prior in date, for the confirmation is a completed diligence, whereas the arrestment, until decree of furthcoming has been obtained, is inchoate.<sup>4</sup> A decree of preference in a multiple-pounding does not exclude the diligence of an executor-creditor;<sup>5</sup> nor is that diligence excluded by a foreign title of administration which has not been confirmed in Scotland.<sup>6</sup> Where a special legacy has been bequeathed, or where special subjects have been assigned to a disponee for a particular purpose, these are not affected by the confirmation of an executor-creditor.<sup>7</sup>

**1130.** By s. 29 of the Bankruptcy (Scotland) Act, 1913,<sup>8</sup> it is declared to be incompetent for any creditor after the date of the first deliverance on a petition for sequestration to be confirmed as executor-creditor, and by s. 106 of the same Act it is provided that, where the estates of a deceased debtor are sequestrated within seven months of his death, a confirmation as executor-creditor is of no effect in competition with

<sup>1</sup> *Willison v. Dewar*, 1840, 3 D. 273.

<sup>2</sup> *Smith's Trs. v. Grant*, 1862, 24 D., per Lord Curriehill at p. 1169.

<sup>3</sup> *Taylor & Ferguson v. Glass' Trs.*, 1912 S.C. 165; *Salaman v. Sinclair's Tr.*, 1916 S.C. 698.

<sup>4</sup> *Wilson v. Fleming*, 1823, 2 S. 430.

<sup>5</sup> *Anderson v. Stewart*, 1831, 10 S. 49.

<sup>6</sup> *Clarke*, 1810, Hume 175.

<sup>7</sup> *Bell v. Willison*, 1831, 9 S. 266; *Innerarity v. Gilmore*, 1840, 2 D. 813.

<sup>8</sup> 3 & 4 Geo. V. c. 20.



the trustee except in so far as to give the creditor a preference for the expense incurred by him in obtaining confirmation.

**1131.** Creditors of the next of kin of a deceased person may claim to be confirmed as if they were creditors of the deceased,<sup>1</sup> but their diligence is postponed to that of creditors of the deceased done within a year and day of the death.

### SECTION 3.—DUTIES AND LIABILITIES.

#### SUBSECTION (1).—*Realisation of Estate.*

##### (i) *Effect of Confirmation.*

**1132.** As above stated, an executor applies to the Sheriff as commissary judge for confirmation of his appointment, and lodges with his application an inventory of the whole moveable estate of the deceased. The confirmation when obtained is the title of the executor to the estate of the deceased as contained in the inventory. If the executor has omitted to include in the inventory part of the deceased's estate through ignorance of its existence, he must eik to his confirmation the additional estate discovered.<sup>2</sup> This is done by lodging an additional inventory *ad omissa*. More than one eik may be made if necessary. Where the executor has underestimated the value of any portion of the estate contained in his inventory, the surplus value appears to be in the same position as a part of the estate entirely omitted from the inventory,<sup>3</sup> and the executor should make an eik to his confirmation to that extent *male appretiata*.

**1133.** When an executor has obtained confirmation he is entitled to administer the estate to which he has been confirmed. His first duty is to ingather and realise the estate set forth in the inventory in order that he may pay debts due by the deceased and distribute the balance amongst those entitled to it. He does not, like a trustee, hold and administer for trust purposes. He is a debtor to the legatees or next of kin, but with a limited liability.<sup>4</sup> His liability does not extend *ultra fines inventarii* (or in the case of an executor-creditor beyond the estate to which he has confirmed), and anyone who has an interest in the estate and is dissatisfied with the inventory given up has his remedy in applying for confirmation *ad omissa vel male appretiata*.

##### (ii) *Period allowed for Realisation.*

**1134.** The executor is allowed twelve months to ingather and realise the estate; he will not be held liable for interest on outstanding debts beyond what he actually receives until after the expiry of that period. He is bound to exercise due diligence in realising the estate for behoof both of the creditors of the deceased and of the legatees or next of kin,

<sup>1</sup> Act 1695, c. 41.

<sup>2</sup> 4 Geo. IV. c. 98, s. 3.

<sup>3</sup> *Smith's Trs. v. Grant*, 1862, 24 D. 1142.

<sup>4</sup> *Jamieson v. Clark*, 1872, 10 M. 399, per Lord Pres. Inglis.

and if he fails in this he will be held responsible for debts unrealised at the end of the twelve months. The fact that he is himself interested in the estate as a beneficiary is no excuse for want of diligence.<sup>1</sup> He is not bound to incur unnecessary expense in doing diligence against an insolvent debtor, when there is no possibility of recovering the debt.<sup>2</sup> His discharge to a debtor of the deceased is valid and sufficient, and the debtor is not concerned with the future application of the money<sup>3</sup> unless he has paid it to the executor in the knowledge of his intention to misapply it.<sup>4</sup> He, or an agent employed by him, is the only person who can grant a valid discharge to a debtor of the executry estate;<sup>5</sup> a discharge by a beneficiary is not a sufficient protection to the debtor.<sup>6</sup> The executor's discharge is only valid to the extent of the sum to which he has been confirmed, and the debtor is not safe in paying the executor a larger sum.<sup>7</sup> Where there is more than one executor the debtor should see that the discharge is binding upon them all before he makes payment. Where an executor in the exercise of his discretion is satisfied that an alleged debt to the estate is not really due, he cannot be forced to proceed against the alleged debtor by a beneficiary who takes a different view, but such a beneficiary is entitled to obtain the use of the executor's name in order to prosecute the claim upon giving the executor an indemnity for expenses.<sup>8</sup>

**1135.** The executor is entitled to a reasonable time to realise investments<sup>9</sup> and to dispose of a going business to the best advantage. If he carries on the business of the deceased he is liable for the administration thereof to the legatees or next of kin, but he is not in the position of a trustee for the creditors of the deceased, and they cannot claim more than the value of the business as given up in the inventory.<sup>10</sup> The goodwill of the business may be an asset which should be included in the inventory.<sup>11</sup> A law agent employed by an executor to realise and ingather the executry estate which was found to be insolvent was held to have all the rights against the executor which he would have had against the deceased, and therefore to be entitled to retain the proceeds of the estate realised by him in extinction of a debt incurred to him by the deceased.<sup>12</sup>

(iii) *Shares in Joint Stock Companies.*

**1136.** Where part of the estate of the deceased consists of shares in a joint stock company the executors have two courses open to them. They

<sup>1</sup> *Forman v. Burns*, 1853, 15 D. 362.

<sup>2</sup> *Ersk. Inst.* iii. 9, 41.

<sup>3</sup> *Hutchison v. Aberdeen Bank*, 1837, 15 S. 1100.

<sup>4</sup> *Taylor v. Forbes & Co.*, 1830, 4 W. & S. 444.

<sup>5</sup> *Barnet v. Duncan*, 1831, 10 S. 128.

<sup>6</sup> *Hinton v. Connell's Trs.*, 1883, 10 R. 1110.

<sup>7</sup> *Buchanan v. Royal Bank of Scotland*, 1842, 5 D. 211.

<sup>8</sup> *Blair v. Stirling*, 1894, 1 S.L.T. 599.

<sup>9</sup> *Buchan v. City of Glasgow Bank*, 1879, 6 R. (H.L.) 44, per Cairns L.C.

<sup>10</sup> *Stewart's Tr. v. Stewart's Exrx.*, 1896, 23 R. 739; *Globe Insurance Co. v. Mackenzie*, 1850, 7 Bell's App. 296.

<sup>11</sup> *Donald v. Hodgart's Trs.*, 1893, 21 R. 246; *Philp's Exr. v. Philp's Exr.*, 1894, 21 R. 482.

<sup>12</sup> *Mitchell v. Mackersy*, 1905, 8 F. 198, overruling *Gray's Trs. v. Royal Bank*, 1895, 23 R. 199.

may either simply make up a title by confirmation and so vest themselves with a right or title to the shares which will enable them to dispose of the shares without going on the register, and may intimate the fact of confirmation to the company as a mere notice that they have made up such a title; or they may, if they think fit, intimate the confirmation to the company and request that the shares shall be transferred to their names, the legal result of which is that they thereby make up a title of ownership in themselves to the shares and thereby become partners.<sup>1</sup> They are thus entitled to transfer the shares without incurring any liability as partners of the company, but if this is their intention they must notify the company to that effect. If they send in their confirmation without any such qualification, it will be recorded and in such a way as to make the executors partners of the company.<sup>2</sup> Executors who do not wish to be put upon the register of shareholders are entitled to have a reasonable time allowed them to sell the shares, and to produce a purchaser who will take a transfer of them.<sup>3</sup> Under the Companies (Consolidation) Act, 1908,<sup>4</sup> executors are enabled to transfer shares belonging to the deceased without being registered as the holders of the shares, and may thus avoid the risk of incurring personal liability.

(iv) *Apportionment Act.*

**1137.** At common law, where a person entitled to draw rents or to receive an annuity or termly payment predeceased a term of payment, his executors received no portion of the rent or instalment due at that term. This hardship was dealt with by a statute passed in the reign of William IV.,<sup>5</sup> which has been superseded by the Apportionment Act, 1870.<sup>6</sup> This Act provides that all rents, annuities (which includes salaries and pensions), dividends (including bonuses), and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day and shall be apportioned in respect of time accordingly.<sup>7</sup> It follows that the executor now receives a portion of the rents, etc., proportionate to the time the deceased lived during the currency of the term. The apportioned part cannot be recovered until the whole sum of which it is a part falls due,<sup>8</sup> but then the executor is entitled to recover his portion by all remedies which would have been competent to the deceased, if he had survived, for the recovery of the whole. In the case of rents which are levied by the heir or proprietor, he thereby becomes responsible to the executor for his share.<sup>9</sup> But before so accounting, he may pay out of the rent collected all burdens which properly fall to be paid out of such rent.<sup>10</sup>

<sup>1</sup> *Wishart v. City of Glasgow Bank*, 1879, 6 R. 1341, per Lord Shand; *Buchan v. City of Glasgow Bank*, 1879, 6 R. (H.L.) 44, per Cairns L.C.

<sup>2</sup> *M'Ewan v. City of Glasgow Bank*, 1879, 6 R. 1315, per Lord Pres. Inglis.

<sup>3</sup> *Buchan v. City of Glasgow Bank*, *supra*, per Cairns L.C.

<sup>4</sup> 8 Edw. VII. c. 69, s. 29.

<sup>5</sup> 4 & 5 Will. IV. c. 22.

<sup>6</sup> 33 & 34 Vict. c. 35.

<sup>7</sup> Secs. 2 and 5.

<sup>8</sup> Sec. 3.

<sup>9</sup> *Lennox v. Reid*, 1893, 21 R. 77.

<sup>10</sup> *Paul v. Anstruther*, 1864, 2 M. (H.L.) 1; *Learmonth v. Sinclair's Trs.*, 1878, 5 R. 548.



Apportionment of dividend is to be made according to the period for which it is declared to be earned.<sup>1</sup>

**1138.** The Act does not apply to sums made payable under policies of assurance;<sup>2</sup> nor to payment of stipend or the ann to the widow and children of deceased clergymen in terms of the Act 1672, c. 13;<sup>3</sup> nor does it exclude express stipulation that no apportionment shall take place.<sup>4</sup> Thus, where trustees were directed to pay to a liferenter the dividends of shares "as received," apportionment was held to be excluded.<sup>5</sup> The statute operates only in favour of executors and puts on them no corresponding liability to disburse funds paid to the deceased in respect of a debt not yet due. Accordingly, where the deceased has received rents in advance, the executor cannot be called upon to refund any portion of such rent. But rent prepaid under an agreement extrinsic of the lease is not forehand in a question with the successor.<sup>6</sup> So also where the conventional term of payment was postponed and the deceased survived the legal but died before the conventional term, the executor was held entitled to recover at the conventional term rents accruing at the date of death.<sup>7</sup> Profits not of the nature of income are not liable to apportionment. Independently of the statute it has been held that where a testator makes a bequest of the universal liferent of an estate consisting of heritage and moveables of different kinds and with different incidents the right to the income of the whole vests as a general rule *de die in diem*.<sup>8</sup>

#### SUBSECTION (2).—*Payment of Debts.*

**1139.** When an executor has realised the executry estate, he should proceed to pay the debts of the deceased. These, whether secured or unsecured, should be settled by the executor before he makes any payment to legatees or distributes any part of the estate amongst the next of kin. He should therefore make full inquiry by advertisement and other means as to what claims there are against the estate. He is not bound to make any payment until the lapse of six months from the date of the deceased's death. If he makes any payment during that period he runs the risk of personal liability in the event of the estate turning out to be insufficient to meet all the claims upon it. An exception is made, however, in the case of certain debts and obligations which are privileged and which may safely be discharged by the executor before the expiry of the six months if he is satisfied they are due. These are the expenses of confirmation, deathbed<sup>9</sup> and funeral expenses (including the expense of cremation),<sup>10</sup> which rank *pari passu*,<sup>11</sup> reasonable mourning

<sup>1</sup> Sec. 5; *In re Griffiths*, 1879, 12 Ch. D. 655.

<sup>3</sup> *Latta v. Edinburgh Ecclesiastical Commrs.*, 1877, 5 R. 266.

<sup>5</sup> *Macpherson's Trs. v. Macpherson*, 1907 S.C. 1067.

<sup>6</sup> *Graham v. Lawson*, 1897, 35 S.L.R. 72.

<sup>7</sup> *Campbell v. Campbell*, 1849, 11 D. 1426; *Blaikie v. Farquharson*, 1849, 11 D. 1456.

<sup>8</sup> *Andrew's Trs. v. Hallett*, 1926 S.C. 1087.

<sup>9</sup> *Sanders v. Hewat*, 1822, 1 S. 310.

<sup>10</sup> Cremation Act, 1902 (2 Edw. VII. c. 8), s. 9.

<sup>11</sup> *Peter v. Munro*, 1749, Mor. 11852.

<sup>2</sup> Sec. 6.

<sup>4</sup> Sec. 7.

for the family of the deceased,<sup>1</sup> aliment for his family till the term following his decease,<sup>2</sup> a year's or term's rent of the house occupied by him, the wages of domestic or farm servants for the year or term current according as they are payable yearly or termly,<sup>3</sup> Crown taxes for a period not exceeding one year,<sup>4</sup> assessments for poor rates,<sup>5</sup> and rates payable under the Ministers' Widows' Fund Act of 1779.<sup>6</sup> These debts and obligations, whether paid before or after the expiry of the six months, should be paid or provided for before any other payments are made.<sup>7</sup>

**1140.** The six months are intended to afford creditors of the deceased an opportunity of producing their claims, and creditors doing diligence within that period are entitled to rank *pari passu* on the estate. When the six months have expired the executor may pay in safety *primo venienti*, unless he has, or ought to have, reason to doubt the solvency of the estate.<sup>8</sup> A creditor who comes forward afterwards must look for payment, not to the executor who has honestly and in good faith handed over the funds to the beneficiaries, but only to the beneficiaries who have received the funds.<sup>9</sup> If, however, a creditor who claims after the expiry of the six months finds the estate still undistributed in the hands of the executor, he is entitled to be ranked *pari passu* on the estate, even with other creditors who have already obtained decree against the executor.<sup>10</sup> All known debts should be provided for before any payment is made to beneficiaries. Where executors had been misled by an overestimate of the value of the estate and had made payments to beneficiaries without retaining sufficient to meet the claim of a creditor, they were held personally liable.<sup>11</sup>

**1141.** If the executor is satisfied that the claim is a good one, it is not necessary for the creditor to constitute it; but if the executry estate is small and the amount of claims uncertain, and the existence or amount of the alleged debt at all doubtful, the executor is entitled to protect himself and the estate by requiring formal constitution.<sup>12</sup> Where an executor unreasonably opposed a claim, he was found personally liable in expenses, with relief against the free executry estate.<sup>13</sup> When there is double distress—that is, when the claims made against the estate exceed the amount of the estate itself—the executor is entitled to raise an action of multiplepoinding in order to obtain exoneration;<sup>14</sup> but such an action is not competent where there is no double distress, but only

<sup>1</sup> *Sheddon v. Gibson*, 1802, Mor. 11855.

<sup>2</sup> *Taylor*, 1851, 13 D. 948; *Barlass v. Barlass' Trs.*, 1916 S.C. 741.

<sup>3</sup> *Ridley v. Haig's Crs.*, 1789, Mor. 11854; *M'Lean v. Shireffs*, 1832, 10 S. 217.

<sup>4</sup> 43 & 44 Vict. c. 19, s. 88.

<sup>5</sup> 19 Geo. III. c. 20, s. 19.

<sup>6</sup> 8 & 9 Vict. c. 83, s. 88.

<sup>7</sup> *Ersk. Inst.* iii. 9, 43, 46.

<sup>8</sup> *Taylor & Ferguson, Ltd. v. Glass' Trs.*, 1912 S.C. 165, per Lord Dunedin.

<sup>9</sup> *Beith v. Mackenzie*, 1875, 3 R. 185, per Lord Gifford; *Stewart's Trs. v. Evans*, 1871, 9 M. 810.

<sup>10</sup> *Russell v. Sunio*, 1791, Bell's Oct. Cas., 217.

<sup>11</sup> *Lamond's Trs. v. Croom*, 1871, 9 M. 662.

<sup>12</sup> *M'Gaan v. M'Gaan's Trs.*, 1883, 11 R. 249, per Lord Pres. Inglis.

<sup>13</sup> *Law v. Humphrey*, 1876, 3 R. 1192.

<sup>14</sup> *Jamieson v. Robertson*, 1888, 16 R. 15.

questions of difficulty as to the validity of claims against the estate, and an executor raising an action of multiplepounding in such circumstances may be found personally liable in expenses.<sup>1</sup> The acknowledgment of a debt by the testator in his testament does not give the creditor therein any advantage over other creditors of the deceased who claim timeously.<sup>2</sup> An executor is not bound to retain estate to meet a contingent claim for future aliment to a pauper lunatic,<sup>3</sup> or a contingent claim under a guarantee by the deceased.<sup>4</sup>

**1142.** If the executor is himself a creditor on the estate his confirmation is held to be a step of diligence for recovering what is due to him, for he cannot be expected to raise an action against himself.<sup>5</sup> On the expiry of the six months, therefore, if no other creditor has done diligence, he is entitled to pay himself from the executry estate any debt due to him, and to relieve himself of any obligation he may have incurred as cautioner for the deceased. But he is not entitled to satisfy his own debt out of the executry funds, to the prejudice of the other creditors, if he knows that the estate is insolvent.<sup>6</sup>

#### SECTION 4.—POWERS.

**1143.** The office of an executor is personal to himself and does not descend to his heirs. Where, therefore, there is only one executor, the office dies with him. When one of two or more executors dies, the office accrues to the survivors or survivor, whether they are executors-nominate or executors-dative.<sup>7</sup> By the Executors (Scotland) Act, 1900,<sup>8</sup> it is provided that where confirmation is granted in favour of more executors-dative than one the powers conferred by it shall accrue to the survivors or survivor, and that while more than two survive a majority shall be a *quorum*. Where a person who is a sole executor or the last survivor of a body of executors has himself a beneficial interest in the estate, the estate vests in him on confirmation. In the event of his death before he has reduced it into his possession, the whole estate, and not merely that part of it which he has actually reduced into possession, passes to his representatives, against whom persons interested in it may claim for their share. An executor-dative is always held to have taken out confirmation for his own interest. But the estate does not vest in an executor-nominate who has only been confirmed for behoof of others until he has actually reduced it into possession.

**1144.** By the Executors (Scotland) Act, 1900,<sup>9</sup> it is provided that when any sole or last surviving executor has died with any funds in

<sup>1</sup> *Mackenzie's Trs. v. Sutherland*, 1895, 22 R. 233.

<sup>2</sup> *Curriehill v. Cumming's Exr.*, 1624, Mor. 3864.

<sup>3</sup> *Edinburgh Parish Council v. Couper*, 1924 S.C. 139.

<sup>4</sup> *Taylor & Ferguson, Ltd. v. Glass' Trs.*, 1912 S.C. 165.

<sup>5</sup> *M'Dowal's Crs. v. M'Dowal*, 1744, Mor. 10007; *M'Leod v. Wilson*, 1837, 15 S. 1043.

<sup>6</sup> *Salaman v. Sinclair's Tr.*, 1916 S.C. 698.

<sup>7</sup> *Stair*, iii. 8, 59; *Anderson v. Kerr*, 1866, 5 M. 32.

<sup>8</sup> 63 & 64 Vict. c. 55, s. 4.

<sup>9</sup> *Ibid.*, s. 6.



Scotland standing or invested in his name as trustee or executor, confirmation by his executor-nominate to the proper personal estate of such trustee or executor-nominate shall be valid and available to such executor for recovering such funds and for assigning and transferring them to such person or persons as may be legally authorised to continue the administration thereof, or where no other act of administration remains to be performed, directly to the beneficiaries entitled thereto. A note or statement of such funds must be appended to the inventory of the personal estate of the deceased trustee or executor-nominate given up by his executors-nominate. But such executors are not bound to make up a title to such funds, nor is the right of any other person to complete a title to such funds by any competent proceedings prejudiced or excluded. By s. 7 of the same Act it is provided that where any confirmation has become inoperative by the death or incapacity of all the executors in whose favour it has been granted, no title to intromit with the estate confirmed therein shall, otherwise than in the circumstances and to the extent authorised by s. 6, transmit to the representatives of any such executors, whatever may be the extent of their beneficial interest therein, but that it shall be competent to grant confirmation *ad non executa* to any estate contained in the original confirmation which may remain unuplifted or untransferred to the persons entitled thereto, and that such confirmation *ad non executa* shall be granted to the same persons and according to the same rule as confirmations *ad omissa* are granted, and be a sufficient title to continue and complete the administration of the estate. Executors *ad non executa*, though they do not assume responsibility for their predecessor, may be bound to call his representatives to account for his intromissions with the estate.<sup>1</sup>

**1145.** Executors, like trustees, may act by a majority. When co-executors differ in opinion regarding any matter concerning either the management or the realisation of the executry estate, the opinion and desire of the majority prevails. But if a majority of co-executors insist upon doing something that is likely to injure or dilapidate the estate, the Court might be induced to interfere with their doing so, and to protect the minority against them.<sup>2</sup> Thus where a majority of executors had made an agreement with a person who claimed to be the widow of the deceased, whereby, in consideration of a sum of money to be paid to them, they undertook to do all in their power to vest the estate of the deceased in her, the Court took the administration out of their hands and appointed a judicial factor.<sup>3</sup> Where a testator has appointed one of his executors to be a *sine quo non*, and that executor declines the office, the other executors may act unless the deed clearly shews the testator's intention to have been that the whole appointment should fall on the failure of the specially selected executor.<sup>4</sup> The appointment

<sup>1</sup> *Nicol v. Wilson*, 1856, 18 D. 1000.

<sup>2</sup> *Mackenzie v. Mackenzie*, 1886, 13 R. 510, per Lord Pres. Inglis; *Wolfe v. Richardson*, 1927 S.C. 305.

<sup>3</sup> *Birnie v. Christie*, 1891, 19 R. 334.

<sup>4</sup> *Forbes v. Honyman*, 1808, 5 Pat. 226.

of a *sine quo non* gives the person so appointed a right to veto the acts of his co-executors, but as, at the same time, his wishes cannot prevail against the wishes of a majority of the executors, such an appointment is inconvenient and may lead to a deadlock in the administration of the executry.

#### SECTION 5.—TITLE TO SUE.

**1146.** An executor has a title to carry on any action which has been instituted by the deceased, provided that the right in respect of which the action is maintained has been transmitted to him. An action of transference was formerly necessary in order to enable him to do so, but now it is competent for him to lodge a minute craving to be sisted in place of the deceased.<sup>1</sup> Where the deceased was pursuer, his representatives are bound at the defender's request to sist themselves, or decree will be given which will be effectual against the estate which they administer. The executor cannot, however, institute an action which is personal to the person whom he represents, such as an action for divorce or declarator of marriage;<sup>2</sup> but where such an action has been raised during the lifetime of the deceased, the executor may, after his death, sist himself in order either to defend a judgment pronounced in favour of the deceased, which has been reclaimed against,<sup>3</sup> or to pursue the action *quoad* an alternative conclusion for damages.<sup>4</sup> Neither can he raise an action for damages for personal injury sustained by the deceased,<sup>5</sup> unless the deceased prior to his death had intimated a claim for such damages.<sup>6</sup> Where a deceased person had raised an action in respect of a personal injury and there is litiscontestation, his executor may carry on such an action.<sup>7</sup> An assignee of executors who had obtained an assignation before the executors had been confirmed to the executry estate has a title to sue an action in respect of the estate, although confirmation would have to be expedite by the executors before he could extract a decree for payment.<sup>8</sup> A beneficiary on the executry estate of a deceased person is not entitled to sue for payment of a debt due to the deceased, even although the executor has an adverse interest and refuses to take action.<sup>9</sup>

**1147.** As co-executors hold the office *pro indiviso*, they should all concur in suing a debtor of the estate. Where one of the executors refuses to concur, the action will be sustained without him, and he might be excluded by a process before the Commissaries on that ground.<sup>10</sup> One executor *qua* next of kin has been held entitled to sue for her share

<sup>1</sup> 31 & 32 Vict. c. 100, s. 96.

<sup>2</sup> Fraser on Husband and Wife, pp. 1146 and 1241.

<sup>3</sup> Ritchie v. Ritchie, 1874, 1 R. 826.

<sup>4</sup> Green v. Borthwick, 1896, 24 R. 211.

<sup>5</sup> Bern's Exr. v. Montrose Asylum, 1893, 20 R. 859.

<sup>6</sup> Leigh's Exr. v. Caledonian Rly. Co., 1913 S.C. 838; cf. Boyce's Exr. v. M'Dougal, 1903, 5 F. 452.

<sup>7</sup> Neilson v. Rodger, 1853, 16 D. 325; Darling v. Gray & Sons, 1892, 19 R. (H.L.) 31.

<sup>8</sup> Mackay v. Mackay, 1914 S.C. 200.

<sup>9</sup> Morrison v. Morrison's Exr., 1912 S.C. 892.

<sup>10</sup> Stair, iii. 8, 59.

another executor who was alleged to be a debtor to the estate.<sup>1</sup> But where five out of six executors had settled an action and the sixth did not oppose, though he was not a party to the minute of settlement, he was held to have no title to continue the action.<sup>2</sup> In consistorial actions the children of the marriage and the next of kin of the defender may appear and state defences.<sup>3</sup>

#### SECTION 6.—TERMINATION OF OFFICE.

**1148.** If there is only one executor, the office terminates on his death. If there are two or more executors, it accrues on the death of one to the survivor or survivors. On the death of an executor who has been appointed a *sine quo non*, the survivors may act unless the deed under which the appointment was made clearly shews that the testator intended that the whole appointment should fall if the specially selected executor was unable to act.<sup>4</sup> After the executry estate has been distributed among the beneficiaries the office of executor comes to an end. The appointment of an executor-dative *qua* factor to a pupil or minor does not terminate on the attainment of majority by the ward.<sup>5</sup> It has never been the practice for an executor to obtain a formal discharge of his intromissions with the executry estate.<sup>6</sup>

<sup>1</sup> *Torrance v. Bryson*, 1841, 4 D. 71.

<sup>3</sup> 24 & 25 Vict. c. 86, s. 10.

<sup>5</sup> *Johnston's Err. v. Dobie*, 1907 S.C. 31.

<sup>2</sup> *Scott v. Craig's Reprs.*, 1897, 24 R. 462.

<sup>4</sup> *Forbes v. Honyman*, 1808, 5 Pat. 226.

<sup>6</sup> *Ersk. Inst.* iii, 9, 47.

## EXECUTOR-CREDITOR.

*See* CONFIRMATION OF EXECUTORS; EXECUTOR.

## EXHIBIT.

*See* CRIME (PROCEDURE); EVIDENCE.



## EXHIBITION, ACTION OF.

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## SECTION 1.—GENERAL.

**1149.** The action of exhibition may be either a principal or an accessory action. In the former case it is used for the purpose of compelling delivery of documents in which the pursuer has a right of property or custody; in the latter it is employed for the purpose of compelling production, with a view to inspection, of documents in which he is interested but of which he does not claim either the property or the custody.

## SECTION 2.—EXHIBITION AND DELIVERY.

**1150.** This is an independent action founded upon the pursuer's sole right of property in the documents, or on his exclusive right to their custody when he is jointly interested with others in the subject with which they deal.<sup>1</sup> The action may be, and usually is, raised in the Court of Session,<sup>2</sup> but its purpose may often be more speedily and cheaply attained by presenting a summary application to the Sheriff.<sup>3</sup> The question may also be raised in the Sheriff Court by way of ordinary action.<sup>4</sup> The pursuer must be able to instruct a right of property in, or to the custody of, the documents,<sup>5</sup> and he cannot demand a general exhibition of writings for the purpose of ascertaining whether any exist which may support his claim. He must condescend upon the special writings of which he requires exhibition.<sup>6</sup> If he shews a right in the documents, it is no answer that he would gain no benefit from them.<sup>7</sup> The action of exhibition is a real action, and may be pursued against any person who is in possession of the documents called for. When the Court is satisfied that they should be produced, the proper course is

<sup>1</sup> Stair, i. 7, 14; iv. 33, 1; More's Notes, li.; Ersk. iv. 1, 52; Dickson on Evidence, 2nd ed., s. 1378.

<sup>2</sup> For style, see Juridical Styles, 3rd ed., iii. 20.

<sup>3</sup> *M'Kirdy v. M'Lachlan*, 1840, 2 D. 949; Dickson on Evidence, 2nd ed., s. 1379.

<sup>4</sup> *Dove Wilson*, Sheriff Court Practice, p. 421; Wallace, Sheriff Court Practice, p. 443; *Lewis*, Sheriff Court Practice, 7th ed., p. 96; *Whyte v. Kilmarnock District Committee* (Sh. Ct.), 1912, 2 S.L.T. 15.

<sup>5</sup> *Crawford v. Campbell*, 1826, 2 W. & S. 440.

<sup>6</sup> *Duke of Hamilton v. Douglas*, 1761, Mor. 3966.

<sup>7</sup> *Campbell v. Crawford*, 1783, Mor. 3973.

to appoint them to be exhibited in the hands of the Clerk of Court.<sup>1</sup> A trustee in bankruptcy is armed with sufficient powers, under the Bankruptcy Acts, to compel production of the debtor's documents, and does not require to have recourse to an action of exhibition.<sup>2</sup>

### SECTION 3.—EXHIBITION AD DELIBERANDUM.

**1151.** The right which our older law gave to the heir to deliberate for a definite period whether he would take up the succession of his ancestor or not has become of little practical consequence owing to the provisions of the Conveyancing (Scotland) Act, 1874.<sup>3</sup> A personal right to the estate now vests in the heir without service,<sup>4</sup> and he is no longer liable for the debts of his ancestor, beyond the value of the estate to which he succeeds, or of his intromissions.<sup>5</sup> In the days, however, when entry as heir carried with it universal liability for the ancestor's debts, it was a matter of great consequence for the heir to determine whether the succession was *damnosa* or *lucrosa*. For this purpose he was at one time allowed a year and a day after the ancestor's death to deliberate (the *annus deliberandi*), which period was afterwards reduced to six months; and by means of the action of exhibition he might compel the production, for the purpose of inspection, of all writings granted to or by his ancestor, and whether perfected by sasine or not, with the view of ascertaining the position of the estate. He might raise the action at any time before his actual entry as heir, even although after the expiry of the *tempus deliberandi*; and it was competent against all persons in possession of the writs required, whether relations or strangers.<sup>6</sup> The usual defences to the action were that the pursuer was already entered, and so had no occasion to deliberate; that he was excluded from the succession by some deed of his ancestor's; that he had been charged to enter by the creditor pursued and had renounced, though this was not a good defence in the mouth of any other creditor; or that the writs were recorded in a public register in Edinburgh and therefore accessible to the heir. But he was not bound to follow them to registers elsewhere.<sup>7</sup> The action is competent also in the Sheriff Court.<sup>8</sup>

<sup>1</sup> *Clark v. Melville*, 1880, 8 R. 81.

<sup>2</sup> Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), ss. 86, 87, and 89; *Selkirk v. Service*, 1880, 8 R. 29; Goudy on Bankruptcy, 4th ed., p. 237.

<sup>3</sup> 37 & 38 Vict. c. 94.

<sup>4</sup> *Ibid.*, s. 9.

<sup>5</sup> *Ibid.*, s. 12.

<sup>6</sup> *Tailzifer v. Forrester and Sornbeg*, 1661, Mor. 4006; *Buchanan v. Marquis of Montrose*, 1805, Mor. 4010; *Spark v. Barclay*, 1715, Mor. 3988; *Stair*, iv. 33, 4; *Ersk.* iii. 8, 56; *Bankt.* iii. 4, 66; *Bell's Prin.*, 10th ed., s. 1688; *Dickson on Evidence*, 2nd ed., s. 1380; *Mackay's Practice*, i. 285; *Mackay's Manual*, p. 130. See APPARENT HEIR, *ante*, Vol. I. p. 379.

<sup>7</sup> *Stair*, iv. 33, 7; *Ersk.* iii. 8, 57. For style, see *Juridical Styles*, 3rd ed., iii. 21.

<sup>8</sup> *Dove Wilson, Sheriff Court Practice*, p. 421; *Wallace, Sheriff Court Practice*, p. 443.

## SECTION 4.—EXHIBITION AD PROBANDUM.

**1152.** This was an accessory action used for the purpose of recovering writings in the hands of third parties, to be produced *in modum probationis* in a depending process. The action is now almost entirely unknown in practice, having been superseded by the use of incident diligences, granted in the course of the principal process, against the persons in possession of the writings called for.<sup>1</sup>

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<sup>1</sup> See ACTION, *ante*, Vol. I. p. 110; Ersk. iv. 1, 52; Dickson on Evidence, 2nd ed., s. 1381; Mackay's Practice, i. 365; Mackay's Manual, p. 178; Shand's Practice, i. 369.

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## EXHUMATION.

*See* BURIAL AND CREMATION.

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## EXONERATION AND DISCHARGE.

*See* DISCHARGE; TRUSTEE; TUTORS AND CURATORS.



## EXPENSES.

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## SECTION 1.—THE AWARD AND ITS INCIDENTS.

SUBSECTION (1).—*Right of Court to Award.*<sup>1</sup>

**1153.** There is an inherent power in the Court to award expenses.<sup>2</sup> Although it is the general practice to insert in a summons a conclusion for expenses, such a proceeding is by no means necessary in order

<sup>1</sup> Maclaren, Expenses, p. 3.<sup>2</sup> *Ledgerwood v. M'Kenna*, 1868, 7 M. 261.

that expenses may be awarded by the Court.<sup>1</sup> In our older practice there was no conclusion for expenses, though expenses were constantly given. This right to give expenses was imported from the *jus civile* into our common law. As if, however, to put this right beyond doubt, several Acts of the Scottish Parliament have definitely recognised it, more particularly the Statute of 1592, c. 144. The reason for this rule seems to be that as expenses are merely an accident of a legal process, it is *pars judicis* to deal with them.<sup>2</sup> This right, however, seems confined to judicial proceedings, and does not extend to purely administrative processes where expenses can only be awarded when these or the objections thereto are vexatious.<sup>3</sup>

#### SUBSECTION (2).—Discretion of Court.

**1154.** Expenses are in the discretion of the Court, and though it is quite competent to appeal against a judgment on the question of expenses alone, the discretion of the judge before whom the case has been heard is seldom interfered with.<sup>4</sup> In *Caldwell v. Dykes*<sup>5</sup> Lord President Dunedin observed: "I have no hesitation in saying that I think an appeal on expenses merely, without touching the merits, ought to be severely discouraged, both in the Sheriff Court and in this Court, and that it is not too much to say that it should never be given effect to unless either there has been an obvious miscarriage of justice in the interlocutor reclaimed against, or in some of these cases where the expenses have become a great deal more valuable than the merits." Where a pursuer was granted the expenses of a proof in which he had been entirely unsuccessful, the defender's appeal was allowed.<sup>6</sup> In the case of *Wyllie v. Fisher*<sup>7</sup> the appeal was taken and decided solely upon the question of expenses, but in that case the expenses were the merits. In one case where a reclaiming note raised the general question of what was the proper interlocutor to pronounce in respect of a tender, the reclaiming note was sustained.<sup>8</sup> It is incompetent to appeal against an interlocutor which merely approves of the Auditor's report (to which no objections have been lodged) and decerns for the taxed amount of expenses;<sup>9</sup> but where there have been objections to the Auditor's report the Court will entertain an appeal

<sup>1</sup> *Heggie & Co. v. Stark and Selkirk*, 1826, 4 S. 510.

<sup>2</sup> Per Lord Robertson in *Heggie*, *supra*.

<sup>3</sup> *White v. Mags. of Rutherglen*, 1897, 24 R. 446; *County Council of Dumbartonshire v. Clydebank Burgh Commissioners*, 1901, 4 F. 111; *Liddell v. Ballingry Parish Council*, 1908 S.C. 1082.

<sup>4</sup> *Bontine v. Grahame's Trs.*, 1829, 7 S. 619; *Mackintosh v. Garnkirk and Glasgow Rly. Co.*, 1838, 1 D. 211; *Harvey v. Miller*, 1845, 7 D. 604; *Fleming v. North of Scotland Banking Co.*, 1881, 9 R. 11; *Clarke v. M'Nab*, 1888, 15 R. 670; *Bowman's Trs. v. Scott's Trs.*, 1901, 3 F. 450; *Barrie v. Caledonian Rly. Co.*, 1902, 5 F. 30; *Caldwell v. Dykes*, 1906, 8 F. 839; *Feeney v. Fife Coal Co.*, 1918 S.C. 197.

<sup>5</sup> *Supra*, at p. 840.

<sup>6</sup> *Garrioch v. Glass*, 1911 S.C. 453.

<sup>7</sup> 1907 S.C. 686.

<sup>8</sup> *Jack v. Black*, 1911 S.C. 691.

<sup>9</sup> *Tennents v. Romanes*, 1881, 8 R. 824; *Thomson & Co. v. King*, 1883, 10 R. 469; *Stirling-Maxwell's Trs. v. Kirkintilloch Police Commrs.*, 1883, 11 R. 1.



arising out of such objections.<sup>1</sup> It is also incompetent to reclaim upon a question of expenses not argued before the Lord Ordinary.<sup>2</sup>

### SUBSECTION (3).—*Caution*.<sup>3</sup>

**1155.** In certain events to be considered immediately, a party to a litigation may be required to find caution. The party seeking to have his opponent ordained to find caution should as a general rule set forth either on record or by minute some formal and definite statement of the grounds on which he desires his motion granted. The other party must have an opportunity to answer. The Court will not grant the motion unless the dispute as to liability to find caution is clearly formulated.<sup>4</sup>

The cases in which a party may be required to find caution may be classified as follows:—

#### (i) *Bankrupt Pursuer*.

**1156.** The general rule is that an undischarged bankrupt must find caution for expenses before being allowed to proceed with his action, unless the circumstances are exceptional.<sup>5</sup> The ratio of this rule, as stated by Lord Young in *Ritchie v. M'Intosh*,<sup>6</sup> is that a bankrupt who is legally divested of his estate is usually seeking to recover for himself something which is included in his conveyance to another. The person truly vested in the claim refuses to make it, so *prima facie* it cannot be considered a good claim. But where the claim is truly the bankrupt's own, he should not be required to find caution. The general rule applies equally in the case of a person who is divested by a voluntary trust deed.<sup>7</sup> Even in actions of slander a bankrupt pursuer is usually ordained to find caution.<sup>8</sup> In *Cook v. Kinghorn*<sup>9</sup> Lord Kyllachy expressed the view that, on principle, an action for slander being for vindication of character, caution should not be required, but that in ordering caution to be found he was bound by the authorities. In one or two cases of slander, however, caution has not been required.<sup>10</sup>

**1157.** Apart from slander there are numerous exceptions to the general rule. Caution has not been required where a bankrupt pursuer sued his landlord for breaking into his premises and removing furniture,<sup>11</sup>

<sup>1</sup> *Innes v. M'Donald*, 1899, 1 F. 380.

<sup>2</sup> *Aird v. School Board of Tarbert*, 1907 S.C. 22, 305.

<sup>3</sup> Maclaren, p. 11.

<sup>4</sup> *Nakeski-Cumming v. Gordon's Judicial Factor*, 1923 S.C. 770.

<sup>5</sup> *Clarke v. Miller*, 1884, 11 R. 418.

<sup>6</sup> 1881, 8 R. 747.

<sup>7</sup> *Ritchie v. M'Intosh*, *supra*; *Munro v. Mudie* (O.H.), 1901, 9 S.L.T. 53; cf. *Rogerson v. Rogerson's Trs.* (O.H.), 1885, 22 S.L.R. 673; *Fraser v. M'Murich*, 1924 S.C. 93.

<sup>8</sup> *Clarke v. Miller*, *supra*; *Scott v. Roy*, 1886, 13 R. 1173; *Brown v. Oliver & Co.* (O.H.), 1895, 3 S.L.T. 43; *Watson v. Williamson*, 1895, 3 S.L.T. 21; *Powell v. Lang*, 1896, 23 R. 955; cf. *Collier v. Ritchie*, 1884, 12 R. 47; *Miller v. J. M. Smith, Ltd.* (O.H.), 1908, 16 S.L.T. 268; *Johnston v. G. H. Laird & Son*, 1915, 2 S.L.T. 24.

<sup>9</sup> (O.H.), 1904, 12 S.L.T. 186.

<sup>10</sup> *Scott v. Johnston*, 1885, 12 R. 1022; *Briggs v. Amalgamated Press, Ltd.* (O.H.), 1910, 2 S.L.T. 298.

<sup>11</sup> *Thom v. Andrew*, 1888, 15 R. 780.

or his trustees for an accounting,<sup>1</sup> or his wife and her paramour,<sup>2</sup> or his father's trustees for an alimentary debt,<sup>3</sup> or a railway company for the loss of working tools.<sup>4</sup> Nor was caution required where a bankrupt brought a declarator that he held a discharge of certain debts delivered to him before sequestration,<sup>5</sup> nor where a bankrupt had been in business for two years after cessio, and the trustees had not extracted his appointment.<sup>6</sup> As a general rule, a bankrupt applying to the Court for his discharge will not be ordered to find caution for the expenses of his application.<sup>7</sup>

(ii) *Bankrupt Defender.*

**1158.** A bankrupt defender is obliged to find caution for expenses only in exceptional circumstances.<sup>8</sup> When, however, he is really pursuer of the issue, though nominally defender, he must find caution.<sup>9</sup> A bankrupt defender and reclamer is allowed to proceed without caution.<sup>10</sup> Where a respondent becomes bankrupt while an appeal is pending, he does not require to find caution.<sup>11</sup> Where, however, a defender became bankrupt during the dependence of an action, he was not allowed to continue to defend without finding caution in respect that the action was only one for constitution, and the trustee would not sist himself.<sup>12</sup>

(iii) *Company.*<sup>13</sup>

**1159.** By section 278 of the Companies (Consolidation) Act, 1908,<sup>14</sup> "where a limited company is plaintiff or pursuer in any action, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant, if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given." Where there are reductive conclusions, pursuers are held not to be plaintiffs or pursuers in terms of this section, and may proceed without

<sup>1</sup> *Ritchie v. M'Intosh*, 1881, 8 R. 847.

<sup>2</sup> *Derrick v. Derrick* (O.H.), 1900, 8 S.L.T. 321.

<sup>3</sup> *Paton v. Paton's Trs.* (O.H.), 1901, 8 S.L.T. 455.

<sup>4</sup> *Thom v. Caledonian Rly. Co.* (O.H.), 1902, 9 S.L.T. 440.

<sup>5</sup> *M'Alister v. Swinburne*, 1873, 1 R. 166.

<sup>6</sup> *Kennedy v. Crawford* (O.H.), 1899, 7 S.L.T. 26.

<sup>7</sup> *Scott v. Scott's Trs.*, 1914 S.C. 704.

<sup>8</sup> *Taylor v. Fairlie's Trs.*, 1833, 6 W. & S. 301; *Buchanan v. Stevenson*, 1880, 8 R. 220; *Lawrie v. Pearson*, 1888, 16 R. 62; *Drew v. Robertson* (O.H.), 1903, 11 S.L.T. 67.

<sup>9</sup> *Ferguson, Lamont & Co.'s Trs. v. Lamont*, 1889, 17 R. 282; *Robb v. Dickson* (O.H.), 1901, 9 S.L.T. 224; *Professional and Civil Service Supply Association, Ltd. v. Lawson* (O.H.), 1913, 2 S.L.T. 55.

<sup>10</sup> *Weir v. Buchanan*, 1876, 4 R. 8; *Buchanan v. Stevenson*, 1880, 8 R. 220; *Johnstone v. Henderson*, 1906, 8 F. 689.

<sup>11</sup> *Ferguson v. Leslie*, 1873, 11 S.L.R. 16; *Mackay v. Boswell-Preston*, 1916 S.C. 96.

<sup>12</sup> *Smith's Trs. v. M'Cheyne*, 1879, 16 S.L.R. 592.

<sup>13</sup> *Maclaren*, pp. 18, 368; *Brownrigg Coal Co. v. Sneddon*, 1911 S.C. 1064.

<sup>14</sup> Companies Act, 1862, s. 69.

finding caution.<sup>1</sup> The section does not apply to parties who are defenders but who appear as reclaimers.<sup>2</sup> Where the pursuers had been successful in the Sheriff Court and the defenders appealed, it was held that in opposing the appeal a company in liquidation was not a pursuer in the sense of the section, and that no caution for expenses was required.<sup>3</sup> Where the defenders averred that the pursuers had no assets and the pursuers averred a guarantee fund, no caution was required.<sup>4</sup> The circumstances under which the Court will make a pursuing company find caution were considered by the Second Division in *Edinburgh Entertainments, Ltd. v. Stevenson*.<sup>5</sup> Where the Lord Ordinary exercises the discretion which the section gives him, the Court will not interfere, unless it can be shewn that he has gone completely wrong.<sup>6</sup>

(iv) *Miscellaneous.*

**1160.** If the pursuer is the recipient of parochial relief he must find caution<sup>7</sup> though in two cases caution was not required.<sup>8</sup> Poverty of itself will not lay upon the pursuer such an obligation; he must either have been divested of his estate or be manifestly a mere catspaw.<sup>9</sup> Where the pursuer has assigned his whole right in the subject of a cause to a third party,<sup>10</sup> or is merely put forward as a man of straw by wealthy people,<sup>11</sup> he will require to find caution; but not where he is a genuine representative of an association or committee.<sup>12</sup> Where there is no *ex facie* irregularity in a decree, a suspender will require to find caution.<sup>13</sup> An adverse report by the reporters *probabilis causa* does not necessitate a pursuer to find caution<sup>14</sup> although in some instances a pursuer has been ordained to do so.<sup>15</sup> Where the adverse report is combined with the receipt of parochial relief caution is required.<sup>16</sup> A married woman who did not design herself as such and had no separate estate, and who sued a debtor of a trust of which she was a beneficiary,

<sup>1</sup> *English Coasting and Shipping Co. v. British Finance Co.*, 1886, 13 R. 430.

<sup>2</sup> *Sinclair v. Glasgow and London Contract Corp'n., Ltd.*, 1904, 6 F. 818.

<sup>3</sup> *Star Fire and Burglary Insurance Co., Ltd. v. Davidson & Sons*, 1902, 4 F. 997.

<sup>4</sup> *Southern Bowling Club, Ltd. v. Edinburgh Evening News* (O.H.), 1901, 9 S.L.T. 35.

<sup>5</sup> 1925 S.C. 848.

<sup>6</sup> *New Mining and Exploring Syndicate, Ltd. v. Chalmers & Hunter*, 1909 S.C. 1390; *Brownrigg Coal Co. v. Sneddon*, 1911 S.C. 1064.

<sup>7</sup> *Hunter v. Clark*, 1874, 1 R. 1154; *Robertson v. Midlothian County Council*, 1898, 25 R. 569; *Fraser v. Mackintosh* (O.H.), 1901, 9 S.L.T. 117; *Maclaren v. Maclaren* (O.H.), 1910, 1 S.L.T. 29.

<sup>8</sup> *Macdonald v. Simpson*, 1882, 9 R. 696; *Johnston v. Dryden*, 1890, 18 R. 191.

<sup>9</sup> *Porteous v. Pearl Life Assurance Co., Ltd.* (O.H.), 1901, 8 S.L.T. 430.

<sup>10</sup> *Walker v. Kelty's Trs.*, 1839, 1 D. 1066.

<sup>11</sup> *Jenkins v. Robertson*, 1869, 7 M. 739; *Robertson v. Duke of Atholl* (O.H.), 1905, 42 S.L.R. 601, 13 S.L.T. 22, 215.

<sup>12</sup> *Potter v. Hamilton*, 1870, 8 M. 1064.

<sup>13</sup> *Hardie v. Brown, Barker & Bell*, 1907, 15 S.L.T. 539.

<sup>14</sup> *Thompson v. North British Rly. Co.*, 1882, 9 R. 1101, 19 S.L.R. 817; *Gore v. Westfield Autocar Co.*, 1923 S.C. 100.

<sup>15</sup> *Robertson v. Meikle*, 1890, 28 S.L.R. 18; *Buchanan v. Ballantine*, 1911 S.C. 1368.

<sup>16</sup> *Hunter v. Clark*, 1874, 1 R. 1154.



was ordained to find caution.<sup>1</sup> Where, however, a married woman sued for recovery of property which she averred was paraphernalia, she was allowed to proceed without finding caution.<sup>2</sup> Where a lady brought an action against her divorced husband for her legal rights, and averred that he had left Scotland and was disposing of the estate to her prejudice, the defender was ordained to find caution.<sup>3</sup> A discharged bankrupt can sue for sums which his trustee failed to recover without finding caution.<sup>4</sup> When a party is ordained to find caution it is only for future expenses.<sup>5</sup> Caution may be asked for at any stage of a case,<sup>6</sup> but the motion must not be delayed too long.<sup>7</sup>

SUBSECTION (4).—*Payment of Prior Expenses as a Condition Precedent.*<sup>8</sup>

**1161.** There is no statutory authority enabling the Court to attach a condition that payment of expenses in a prior action shall form a condition precedent to a subsequent action being allowed to proceed, yet the Court has always exercised such a power. While the determination of this question, like other questions of expenses, is purely discretionary,<sup>9</sup> the rule that seems to have been adopted by the Court and sought generally to be followed is that, if the expenses of the prior action can be truly regarded as expenses in the subsequent litigation, expenses in the prior action must be paid before the subsequent action is allowed to proceed;<sup>10</sup> but if the two actions are quite distinct, no such condition will be imposed.<sup>11</sup> The rule, however, is not inflexible.<sup>12</sup> Where a party is allowed to amend his record, it appears to lie in the discretion of the Court whether payment of the expenses of the amendment is a condition precedent to his continuing the action.<sup>13</sup> It has been the invariable custom for the Court to insist upon the expenses of a decree in absence being paid before a party can attempt to reduce it.<sup>14</sup>

<sup>1</sup> *Teulon v. Seaton*, 1885, 12 R. 971.

<sup>2</sup> *Sleigh v. Yeaman* (O.H.), 1900, 8 S.L.T. 114.

<sup>3</sup> *Robertson v. M'Caw*, 1911 S.C. 650.

<sup>4</sup> *Cooper v. Frame & Co.*, 1893, 20 R. 920.

<sup>5</sup> *Douglas v. M'Kinlay*, 1902, 5 F. 260.

<sup>6</sup> *Stevenson v. Lee*, 1886, 13 R. 913.

<sup>7</sup> *Simpson v. Allan*, 1894, 31 S.L.R. 572; *M'Crae v. Bryson*, 1922, S.L.T. 664.

<sup>8</sup> *Maclaren*, p. 6.

<sup>9</sup> *Byres' Trs. v. Gemmell* (O.H.), 1906, 4 S.L.T. 21.

<sup>10</sup> *Struthers v. Dykes*, 1848, 8 D. 815; *Wallace v. Henderson*, 1876, 4 R. 264; *Irvine v. Kinloch*, 1885, 13 R. 172; *M'Murphy v. MacCulloch*, 1889, 16 R. 678; *M'Carthy v. Emery*, 1897, 24 R. 610; *Wilson v. Crichton* (O.H.), 1898, 5 S.L.T. 350; *Nixon v. Houston*, 1898, 1 F. 78; *Paton v. Paton*, 1901, 9 S.L.T. 281, *affd.* H.L. 1903, 10 S.L.T. 633; *Somervell v. Tait* (O.H.), 1908, 15 S.L.T., 16 S.L.T. 139.

<sup>11</sup> *Stuart v. Moss*, 1886, 13 R. 572.

<sup>12</sup> *Mags. of Dundee v. Morris*, 1856, 19 D. 168; *Scott v. Campbell*, 1840, 2 D. 631; *Byres' Trs. v. Gemmell*, *supra*.

<sup>13</sup> *Cowan v. Clark & Macdonald* (O.H.), 1911, 2 S.L.T. 447; *Dougall v. Caledonian Rly. Co.*, 1913 S.C. 349; *Morgan, Gellibrand & Co. v. Dundee Gem Line Steam Shipping Co.*, 1890, 18 R. 205.

<sup>14</sup> *Smyth v. Nisbet*, 1826, 4 S. 538.

SUBSECTION (5).—*Award of Expenses.*<sup>1</sup>(i) *Ordinary Award.*

**1162.** By 6 Geo. IV. c. 120, s. 17, it is enacted that the Lord Ordinary in pronouncing judgment on the merits “shall also determine the matter of expenses so far as not already settled, either giving or refusing the same in whole or in part.” Notwithstanding this section, it has been held that the Lord Ordinary in the interlocutor disposing of the merits may reserve the question of expenses to be dealt with by a subsequent interlocutor.<sup>2</sup> By s. 21 of the same Act it is provided that “the Inner House shall, in deciding the cause, also determine the matter of expenses, and the judgment pronounced in the Inner House shall be final in the Court of Session.” This provision is peremptory where the Division exhausts the case and where the Division advises summary reclaiming notes under ss. 27 and 28 of the Court of Session Act, 1868, as amended by Act of Sederunt, 10th March 1870, ss. 1 and 2, and the Statute Law Revision Act, 1893; but where the reclaiming notes are presented under s. 54 of the Court of Session Act, the Division may either dispose of the question of expenses or reserve them for the consideration of the Lord Ordinary.<sup>3</sup>

**1163.** Expenses must be expressly awarded or expressly reserved, and if the interlocutor exhausting the merits is silent on the question of expenses, the Court has no power thereafter to make an award.<sup>4</sup> If, however, the failure to make an award of expenses is a mere omission, the interlocutor will probably be corrected if the case is enrolled immediately for this purpose.<sup>5</sup> Interlocutory judgments in which expenses are not awarded do not fall under the rule.<sup>6</sup> An award of expenses is an award as between party and party, and cannot be afterwards altered so as to award expenses as between agent and client.<sup>7</sup> In fact, the time of award is the proper time to have any question qualifying the ordinary award adjusted,<sup>8</sup> as it is too late to raise such questions upon the Auditor’s report.<sup>9</sup> Expenses may not only be awarded but they may be awarded to a greater extent than craved<sup>10</sup> without being con-

<sup>1</sup> Maclaren, p. 37.

<sup>2</sup> *Bannatine’s Trs. v. Cunninghame*, 1872, 10 M. 317.

<sup>3</sup> *Macfie v. Blair*, 1884, 22 S.L.R. 224.; *Tait’s Trs. v. Lees*, 1886, 13 R. 1104.

<sup>4</sup> *Wilson’s Trs. v. Wilson’s Factor*, 1869, 7 M. 457; *Dobbie v. Duncanson*, 1872, 10 M. 810; *Macdonald v. M’Eachan*, 1880, 7 R. 574; *Fraser v. Fraser* (O.H.), 1903, 11 S.L.T. 70.

<sup>5</sup> *Ranken v. Kirkwood*, 1855, 18 D. 31; *Wilson’s Trs. v. Wilson’s Factor*, *supra*; and see also *Kennedy v. Clyde Shipping Co.*, 1908 S.C. 895.

<sup>6</sup> *Crabbe & Robertson v. Stubbs, Ltd.*, 1896, 3 S.L.T. 235.

<sup>7</sup> *Fletcher’s Trs. v. Fletcher*, 1888, 15 R. 862.

<sup>8</sup> *Allan’s Tr. v. Allan & Son*, 1891, 19 R. 15, per Lord Young; *Campbell v. Stewart*, 1838, 1 D. 129; *M’Millan v. Mackinlay*, 1926 S.C. 673.

<sup>9</sup> *Macfie v. Blair*, 1884, 22 S.L.R. 224; *Murray v. Macfarlane’s Trs.*, 1895, 25 R. 80; *Electric Construction Co. v. Hurry & Young*, 1897, 24 R. 525; *Mackellar v. Mackellar*, 1898, 25 R. 883; *Aberchirder Mags. v. Banff District Council*, 1906, 8 F. 571; S.S. “*Fulwood*,” *Ltd. v. Dumfries Harbour Commissioners*, 1907 S.C. 456, 735; *Warrand v. Watson*, 1907 S.C. 432; *Young v. Mags. of Darvel*, 1923 S.C. 745.

<sup>10</sup> *Gordon v. M. Hyslop & Co.*, 1826, 4 S. 512.

cluded for.<sup>1</sup> A general finding of expenses in an ordinary appeal or in an appeal from a deliverance in a sequestration carries expenses in the Sheriff Court,<sup>2</sup> but not in a case where the Court suspends a decree of an inferior Court.<sup>3</sup> A simple adherence to a Lord Ordinary's interlocutor which has awarded expenses does not carry Inner House expenses, which must be specially moved for and granted.<sup>4</sup> This rule applies also to Bill Chamber cases.<sup>5</sup> An award of expenses includes the expense of extract.<sup>6</sup> Where a Lord Ordinary found neither party entitled to expenses and a reclaiming note was taken on the merits, the Inner House adhered to the Lord Ordinary on the merits but refused to consider the question of his award of expenses on the ground that it had not been opened on.<sup>7</sup>

(ii) *Interim Award*.<sup>8</sup>

**1164.** It is within the discretion of the judge to give an interim award of expenses upon a point distinct and separate from the rest of the cause. So where a discussion took place during the progress of a cause on a point which was distinct from the merits and which could not be affected by the ultimate decision, the expenses of the discussion were awarded to the party succeeding therein.<sup>9</sup> Where the interim award is modified, no further expenses can be obtained in respect of the part modified by the party receiving the interim modified award should he ultimately be successful in the cause.<sup>10</sup> If the interim award of expenses is unqualified, it is regarded simply as a payment to account.<sup>11</sup> Whether the payment of an interim award by a pursuer is a condition precedent of being allowed to proceed has not been quite settled, but in *Wight v. Ewing*<sup>12</sup> Lord Pres. Hope expressed the opinion that after an interim decree for expenses the pursuer was placed in a somewhat analogous situation to that of a party who is reponed on condition of paying certain expenses, and who cannot proceed without paying them. The Court, however, did not decide the point, though, at the time, they discharged an order for trial. In *Nixon v. Houston*<sup>13</sup> the Court insisted upon payment of the expenses of an adjournment by the pursuer before being allowed to proceed, but they did not decide the general question.

<sup>1</sup> *Heggie v. Stark and Sellkrig*, 1826, 4 S. 510; *Scott v. Wilson*, 1829, 7 S. 566.

<sup>2</sup> *Kerr v. M'Kechnie*, 1845, 7 D. 809; *Darling v. Mein*, 1852, 24 T. 161; *Sinclair v. Mossend Iron Co.*, 1855, 17 D. 784; *Halbert v. Bogie*, 1857, 19 D. 762.

<sup>3</sup> *Graham v. Cuthbertson*, 1828, 7 S. 224; *Martin v. Easton*, 1830, 8 S. 952.

<sup>4</sup> *Grant v. Rose*, 1835, 13 S. 1007; *Macdonald v. M'Eachan*, 1880, 7 R. 574.

<sup>5</sup> *Aitchison v. Aitchison*, 1829, 7 S. 558.

<sup>6</sup> *Scott v. North British Rly. Co.*, 22 D. 922; *Orr v. Smith*, 1891, 28 S.L.R. 589.

<sup>7</sup> *Clark v. Sutherland*, 1897, 24 R. 821; *Bank of Scotland v. Morrison*, 1911 S.C. 593.

<sup>8</sup> Maclaren, p. 43. For interim awards in consistorial cases, see paras. 1250 *et seq.*, *infra*.

<sup>9</sup> *Waddel v. Hope*, 1843, 6 D. 160; *Vaughan v. Davidson*, 1854, 16 D. 922.

<sup>10</sup> *Countess Strangford v. Hurler and Campsie Alum Co.*, 1861, 23 D. 534.

<sup>11</sup> *Cameron & Waterson v. Muir & Son*, 1861, 23 D. 535.

<sup>12</sup> 1834, 12 S. 535.

<sup>13</sup> 1898, 1 F. 78.



Interest runs on an interim decree for expenses when extracted and charged upon.<sup>1</sup>

SUBSECTION (6).—*Separate Action for Expenses Incompetent.*<sup>2</sup>

**1165.** Expenses being merely accidental to a legal process,<sup>3</sup> a separate action for their recovery is incompetent<sup>4</sup> except in the case of a *dominus litis*,<sup>5</sup> or in a consistorial action, where the wife's agent has been held entitled to sue the husband for his wife's expenses in a separate action.<sup>6</sup> But an action may be competent where the expenses sought to be recovered are not truly expenses of process.<sup>7</sup>

SUBSECTION (7).—*Rules as to Expenses.*

(i) *General Rule.*

**1166.** While expenses are in the discretion of the Court, it is equally true that the Court is wont to exercise its discretion along well-defined and logical lines. As Lord Pres. Robertson has said: "The principle upon which the Court proceeds in awarding expenses is that the cost of litigation should fall on him who has caused it. The general rule for applying this principle is that costs follow the event, the *ratio* being that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be, and that whosoever has resisted the vindication of those rights, whether by action or by defence, is *prima facie* to blame. In some cases, however, the application of the general rule would not carry out this principle, and the Court has always, on cause shown, considered whether the conduct of the successful party, either during the litigation or in the matters giving rise to the litigation, has not caused or contributed to bring about the lawsuit."<sup>8</sup>

**1167.** Where success is complete, the successful party is entitled to his full expenses as taxed. This rule operates notwithstanding that the judgment in the case may have overturned what was generally accepted as a precedent,<sup>9</sup> and also where the party is successful in an appeal occasioned by the erroneous order of the Court below against which he was barred from appeal at the time.<sup>10</sup>

<sup>1</sup> *Dalmahoy & Wood v. Mags. of Brechin*, 1859, 21 D. 210; *Wallace v. Henderson* (O.H.), 1876, 4 R. 264.

<sup>2</sup> *Maclaren*, p. 19.

<sup>3</sup> Para. 115<sup>2</sup>, *supra*.

<sup>4</sup> *Young v. Nith Commissioners*, 1880, 7 R. 891; *Wood v. Wood's Trs.*, 1904, 6 F. 640; *Cullen's Exrs. v. Kilmarnock Theatre Co.* (O.H.), 1913, 1 S.L.T. 290; 1914, 2 S.L.T. 34; *Martin's Exr. v. M'Ghee*, 1914 S.C. 628.

<sup>5</sup> *Kerr v. Employers' Liability Assurance Corporation, Ltd.*, 1899, 2 F. 17; and see also *Harvey v. Glasgow Corporation*, 1915 S.C. 600.

<sup>6</sup> *Clark v. Henderson*, 1875, 2 R. 428; *Riddle v. Riddle* (O.H.), 1904, 12 S.L.T. 361; see para. 1326.

<sup>7</sup> *Presbytery of Deer v. Heritors of Pitsligo*, 1876, 3 R. 975; see also *Dougall v. Mags. of Dunfermline*, 1908 S.C. 151; *Mushetts Ltd. v. Mackenzie Brothers*, 1899, 1 F. 756.

<sup>8</sup> *Shepherd v. Elliot*, 1896, 23 R. 695; see also *Wood & Co. v. Mackay*, 1906, 8 F. 625.

<sup>9</sup> *Crawford & Petrie v. Beattie*, 1862, 24 D. 357.

<sup>10</sup> *Douglas v. Kirkpatrick*, 1850, 13 D. (H.L.) 19.

**1168.** The Codifying Act of Sederunt <sup>1</sup> provides, "Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings." <sup>2</sup> The rule of the Act of Sederunt operates notwithstanding that a modification of expenses has been ordered. In this latter case the expenses of such part of the case as can be clearly distinguished as unsuccessful, or which has been caused by the fault of the successful party, are first taxed off, and thereafter the modification is made.<sup>3</sup> Preliminary pleas are not particular parts or branches in a case, and accordingly, if the successful party is unsuccessful upon any such pleas, the auditor has no power to withhold from him the expenses occasioned by such pleas.<sup>4</sup> Some cases must be looked upon as a whole, and so a successful party, notwithstanding that he has put forward a number of pleas on the merits which have been unsuccessful, is entitled to have the expenses of the whole case allowed.<sup>5</sup> The auditor cannot withhold "reserved expenses" from the party who is ultimately successful and is awarded a general finding.<sup>6</sup> Some doubt was occasioned on the question of "expenses in the cause" by the decision of the Second Division, in *Alston & Orr v. Allan*,<sup>7</sup> which decided that the auditor had power to treat them as ordinary expenses, but a judgment of the First Division, in consultation with the Second Division, has established the rule that for the future "expenses in the cause" must go to the party ultimately successful. that the auditor has no discretion in the matter, and that the Act of Sederunt quoted above has no application to expenses found to be expenses in the cause.<sup>8</sup>

**1169.** Success, however, is a relative term, and a distinction used to be drawn between what was considered to be success in actions of damages and actions founded on *quantum meruit*.<sup>9</sup> In the latter class of case, where less was recovered than the sum sued for, expenses were generally modified,<sup>10</sup> or neither party was awarded expenses.<sup>11</sup> on the ground of divided success; <sup>12</sup> while in the former class of case a verdict for over £5, or for less, when accompanied by a certificate from the

<sup>1</sup> C.A.S., K, iv. App. ii. No. 5.

<sup>2</sup> *Craig v. Craig*, 1906, 44 S.L.R. 100, 14 S.L.T. 469.

<sup>3</sup> *M'Elroy & Sons v. Tharsis Sulphur and Copper Co.*, 1879, 6 R. 1119; *Arthur v. Lindsay*, 1895, 22 R. 904.

<sup>4</sup> *Earl of Lauderdale v. Wedderburn*, 1911 S.C. 4

<sup>5</sup> *Kelvin v. Whyte, Thomson & Co.* (O.H.), 1909, 1 S.L.T. 477.

<sup>6</sup> *Macfie v. Blair*, 1884 (O.H.), 22 S.L.R. 224; *Gardiners v. Victoria Estates Co.*, 1885, 13 R. 80; *Caledonian Rly. Co. v. Chisholm*, 1889, 16 R. 622; *Alston & Orr v. Allan*, 1910 S.C. 304.

<sup>7</sup> *Supra*.

<sup>8</sup> *Glasgow and South-Western Rly. Co. v. Mags. of Ayr*, 1911 S.C. 298.

<sup>9</sup> *Smith v. West of Scotland Exchange Investment Co.*, 1847, 10 D. 213.

<sup>10</sup> *Smith, supra*; *Webster v. Alexander*, 1859, 21 D. 1214.

<sup>11</sup> *Dalkeith Police Commissioners v. Duke of Buccleuch*, 1889, 16 R. 575.

<sup>12</sup> Para. 1177.

presiding judge, was sufficient to carry full expenses, the reason being that the amount of the sum concluded for in an action of damages was considered to be a mere formality, and that really it was for the jury to work out a sum according to their own ideas.<sup>1</sup> The judgment in the case of *Gorman v. Hughes*<sup>2</sup> recognised, however, that this rule has been departed from, and that in actions of damages the special circumstances of each case must be considered. Following upon that judgment, the Act of Sederunt, 20th March 1907,<sup>3</sup> was passed, and in jury trials where the pursuer does not recover more than £50, he is not entitled to more than one-half expenses, unless the judge grants him a certificate entitling him to not more than two-thirds.<sup>4</sup> Jury trials for defamation or for libel, and actions only competent in the Court of Session, are exempted from this limitation.

(ii) *Exceptions to the General Rule.*

**1170.** The rule that complete success results in an award of full expenses, as taxed, to the successful party, admits, however, of many exceptions, and for various reasons the successful party may have his full expenses (1) modified or (2) refused, or (3) the successful party may be found liable in expenses.<sup>5</sup> When expenses are modified, the Court is slow to interfere with the discretion of the judge.<sup>6</sup> Modification may be made for two reasons : (1) To save expense of taxation ; and (2) to mark disapproval by the Court of certain aspects of the successful party's averments or actings.

(a) *Modification to save Expense of Taxation.*

**1171.** This power is used sparingly, and only where there has been little expenditure, and where the judge really knows what expenditure there has been, and is in a position to determine as to what part of it should be allowed.<sup>7</sup> It is therefore most frequently employed in the early stages of a litigation or where a litigation is brought to an end either in whole or part before much progress has been made. It is also suitable for incidental applications and discussions.

**1172.** Modification to save the expense of taxation has been made in the following circumstances : Where an appeal or reclaiming note has been withdrawn (a) on the Single Bills, £3, 3s. ;<sup>8</sup> (b) after case put out for hearing, but before counsel were instructed, £2, 2s.<sup>9</sup> The general rule is that the respondent will be allowed in the case of a reclaiming

<sup>1</sup> *Smith, supra* ; *Galloway v. M'Kenzie*, 1860, 33 Sc. Jur. 48 ; *M'Gilp v. Caledonian Rly. Co.*, 1904, 7 F. 4 ; *M'Daid v. Coltness Iron Co.*, 1904, 7 F. 32.

<sup>2</sup> 1907 S.C. 405.

<sup>3</sup> C.A.S., 1913, F, iii. 3.

<sup>4</sup> *Paras. 1200 et seq.*

<sup>5</sup> *Maclaren*, p. 24.

<sup>6</sup> *Mackintosh v. Garnkirk and Glasgow Rly. Co.*, 1838, 1 D. 211 ; *Harvey v. Millar*, 1845, 7 D. 604 (where the Lord Ordinary was reversed) ; *Clarke v. M'Nab*, 1888, 15 R. 670.

<sup>7</sup> *Clarke v. M'Nab, supra.*

<sup>8</sup> *Gentles v. Beattie*, 1880, 8 R. 13.

<sup>9</sup> *Davidson v. Allan*, 1878, 5 R. 763.



note £2, 2s., and in the case of an appeal £3, 3s. But, in certain exceptional cases, a remit will be made to the auditor to tax the respondent's account; <sup>1</sup> (c) the reclamer led the respondent to do some printing, £6, 6s.; <sup>2</sup> (d) while a case stood eleventh on roll, respondent printed a plan. The expenses of the latter were refused, and £2, 2s. awarded; <sup>3</sup> (e) respondent moved for £4, 4s. in respect of his having to consider the advisability of printing certain productions: awarded £2, 2s.; <sup>4</sup> (f) respondent held to have been justified in printing an appendix: awarded £2, 2s. and cost of printing appendix. <sup>5</sup> Where a defender was called by mistake, the pursuer enrolled and consented to absolvitor, £2, 2s. being allowed. <sup>6</sup> Where a pursuer did not insist upon his action, and the defender was assoilzied, there were circumstances in which he was held not to come under s. 10 of the Judicature Act, and expenses were modified. <sup>7</sup> Where the Inner House varied an issue, they modified the expenses to £6, 6s. <sup>8</sup> Where a defender was successful in resisting an issue, the Inner House modified the expenses to £5, 5s. <sup>9</sup> Where a proof was granted instead of the issue wished by the pursuer, expenses were modified to £6, 6s. <sup>10</sup> In an unsuccessful note to the Lord President complaining of a certificate of interdict, £5, 5s. was allowed. <sup>11</sup> An appeal from a process of cessio was refused and expenses modified to £5, 5s. <sup>12</sup> Where a party was forced to appear in Single Bills in order to obtain extract of his decree of expenses, the expense of his appearance was modified. <sup>13</sup> Where a haver appeared in order to protect his lien he was found entitled to the expenses of his appearance, modified to £10, 10s. <sup>14</sup> The expenses in suspensions in the Court of Justiciary are usually modified, <sup>15</sup> as also are expenses of amendments of the record. <sup>16</sup>

(b) *Modification for Other Reasons.*

**1173.** To mark disapproval of certain aspects of successful party's case, expenses have been modified in the following circumstances: where a small amount was awarded; <sup>17</sup> where an action should have been

<sup>1</sup> *Morden v. Brunton & Sons*, 1914 S.C. 388.

<sup>2</sup> *Henderson v. Menzies*, 1900, 3 F. 858.

<sup>3</sup> *MacLachlan v. Mackay*, 1899, 2 F. 163.

<sup>4</sup> *Robertson v. Robertson's Exrs.*, 1899, 2 F. 77.

<sup>5</sup> *Craig v. Marshall & Co.*, 1898, 1 F. 67.

<sup>6</sup> *Brown v. Milliken (O.H.)*, 1902, 9 S.L.T. 371.

<sup>7</sup> *Hare v. Stein*, 1882, 9 R. 910; *Clarke v. M'Nab*, 1888, 15 R. 670.

<sup>8</sup> *Ireland v. North British Rly. Co.*, 1882, 10 R. 53.

<sup>9</sup> *Lennox v. Hurlet and Campsie Alum Co.*, 1859, 22 D. 178.

<sup>10</sup> *Beattie v. Beattie*, 1864, 2 M. 1338.

<sup>11</sup> *Macfarlane v. Shankland*, 1860, 22 D. 1500.

<sup>12</sup> *Donaldson v. Thomson*, 1873, 11 M. 347.

<sup>13</sup> *Gavin v. Henderson & Co.*, 1910 S.C. 357.

<sup>14</sup> *Train & M'Intyre v. Forbes (O.H.)*, 1925, S.N. 33; 1925, S.L.T. 286.

<sup>15</sup> Para. 1337.

<sup>16</sup> Paras. 1215 et seq.

<sup>17</sup> *Shearer v. Malcolm*, 1899, 1 F. 574; *Graham v. Napier*, 1874, 1 R. 391; *Gorman v. Hughes*, 1907 S.C. 405.

raised, or retained, in an inferior Court; <sup>1</sup> where averments were not only false but absolutely reckless and unwarrantable; <sup>2</sup> in an action by a woman against a police magistrate which should not have been countenanced; <sup>3</sup> where the successful party had persistently insulted and provoked the pursuer; <sup>4</sup> where a party refused to shew an opinion of counsel to the opposite agent previous to a case being brought; <sup>5</sup> where a successful party was to blame for failure to adjust a minute of admissions which would have obviated a lengthened proof; <sup>6</sup> where the judgment of the Court proceeded on grounds not pleaded. <sup>7</sup> Full expenses of separate defences are not allowed. Where three defenders, one of whom alone got expenses against the pursuer, employed one agent, the successful defender's expenses were modified to one-third of the expense incurred in common with the other two defenders. <sup>8</sup> Where two defenders were sued separately and had the same law agent and one was successful, the latter's expenses were modified to one-half of the expenses incurred by the defenders in common. <sup>9</sup> Where the print of appeal and title of pleadings were defective, the appellant was allowed to amend on payment of £2, 2s. modified expenses. <sup>10</sup>

(c) *Successful Party refused Expenses.* <sup>11</sup>

**1174.** Expenses have been refused in the following circumstances: Where there has been improper or provocative behaviour of the successful party—(a) In an action of damages for personal injury the pursuer failed to prove his case, but the defender—a schoolmaster—was held to have been wrong in striking the pursuer on the head with a pointer. <sup>12</sup> (b) A successful party failed to implement an arrangement made with the approval of the Court. <sup>13</sup> (c) The letter of the defender sued on, though not slanderous, was foolish and intemperate. <sup>14</sup> (d) The newspaper article sued on, though not slanderous, was provocative of the action. <sup>15</sup> (e) A co-respondent had taken the defender to a house of ill-fame. <sup>16</sup> (f) In an action to provide a retiring allowance for a teacher the School Board failed to furnish a reason for its refusal to give such

<sup>1</sup> *Brennan v. Dundee and Arbroath Rly. Co.*, 1903, 5 F. 811; *Lafferty v. Watson, Gow & Co.*, 1903, 5 F. 885; *Sutherland, Dawson & Co. v. Thomson* (O.H.), 1885, 23 S.L.R. 210; *Gorman v. Hughes*, *supra*; *Thompson v. Aktien Gesellschaft für Glasindustrie* (O.H.), 1917, 2 S.L.T. 266; but see *Carey v. Govan Magistrates*, 1902, 4 F. 811.

<sup>2</sup> *Rigg's Ex. v. Urquhart* (O.H.), 1902, 10 S.L.T. 503.

<sup>3</sup> *M'Creadie v. Thomson* (O.H.), 1907, 15 S.L.T. 753.

<sup>4</sup> *Shepherd v. Elliot*, 1896, 23 R. 695.

<sup>5</sup> *Raeburn v. Baird*, 1832, 10 S. 761.

<sup>6</sup> *Bannerman's Trs. v. Macqueen*, 1896, 3 S.L.T. 301.

<sup>7</sup> *Smith Bros. & Co. v. Scott*, 1875, 2 R. 601; *Woodhead v. Gartness Mineral Co.*, 1877, 4 R. 469.

<sup>8</sup> *Arthur v. Lindsay*, 1895, 22 R. 904.

<sup>9</sup> *Crawford v. Adams*; *Crawford v. Dunlop*, 1900, 3 F. 296.

<sup>10</sup> *Roxburgh v. Barlas*, 1873, 3 R. 288.

<sup>11</sup> Maclaren, p. 27.

<sup>12</sup> *Ewart v. Brown*, 1882, 10 R. 163.

<sup>13</sup> *Campbell v. Earl of Breadalbane*, 1868, 6 M. 632.

<sup>14</sup> *Wardlaw v. Drysdale*, 1898, 25 R. 879.

<sup>15</sup> *Campbell v. Ritchie & Co.*, 1907 S.C. 1097.

<sup>16</sup> *Edward v. Edward*, 1879, 6 R. 1255.

an allowance.<sup>1</sup> (g) In a locality the minister objected to a surrender of teinds by a heritor, and was unsuccessful, but the heritor was refused his expenses because of his delay to make surrender of teinds.<sup>2</sup> (h) On appeal, the Sheriff Court expenses were refused, in respect that the successful party had by his own actings in an arbitration rendered the action necessary.<sup>3</sup> (i) A Court of Session action was caused through the negligence of the successful party to appeal against a judgment of the Sheriff, and Outer House expenses were refused.<sup>4</sup> (j) The successful party was more anxious to be defeated than to succeed, and led the unsuccessful party intentionally into Court.<sup>5</sup> (k) A pursuer raised an action in the Court of Session instead of going to arbitration. The case was sisted to enable the latter to be done, and the pursuer won the arbitration but was refused the expenses of raising his action.<sup>6</sup> (l) A successful defender had made misleading statements on record, calculated to induce the pursuer to proceed with the action which he might otherwise have abandoned.<sup>7</sup> (m) The conduct of the successful party was careless, inaccurate, and misleading.<sup>8</sup> A Lord Ordinary is not, however, justified in refusing expenses on the ground that the evidence is unsatisfactory.<sup>9</sup>

**1175.** Where the procedure in a case is incompetent, irregular, or unnecessary, the Court has shewn its disapproval by refusing expenses. This result has occurred even in cases where the judge is to blame, as, for example, where an incompetent proof was allowed,<sup>10</sup> or again, where a Sheriff did not hear parties before closing the record.<sup>11</sup> In many cases where the error in procedure has been due to one of the parties expenses have been refused. The following are typical examples: A pursuer mistook his remedy and the expenses of a subsequent action were refused.<sup>12</sup> The expenses of separate defences have been refused in the case of certain defenders who had no occasion for separate defences except to state certain pleas which were repelled.<sup>13</sup> An arbiter was called, but no attack was made on his conduct.<sup>14</sup> A petitioner to limit liability under the Merchant Shipping Act was found liable in expenses, but the claimants who had the same interest and ground of claim were refused the expense of separate claims.<sup>15</sup> Defenders who should have made common cause after the case was thrown out on the

<sup>1</sup> *Robb v. Logiealmond School Board*, 1875, 2 R. 698.

<sup>2</sup> *Earl of Minto v. Pennell*, 1873, 1 R. 156.

<sup>3</sup> *Campbell v. Dawson* (O.H.), 1895, 3 S.L.T. 160.

<sup>4</sup> *Taylor's Trs. v. M'Gavigan*, 1896, 23 R. 945.

<sup>5</sup> *Manners v. Fairholme*, 1872, 10 M. 520.

<sup>6</sup> *Robertson v. Brandes, Schönwald & Co.*, 1907 S.C. 1158.

<sup>7</sup> *Armour v. Duff & Co.*, 1912 S.C. 120.

<sup>8</sup> *Robinson v. National Bank of Scotland*, 1916 S.C. (H.L.) 154.

<sup>9</sup> *Wood & Co. v. Mackay*, 1906, 8 F. 625.

<sup>10</sup> *Dick & Stevenson v. Mackay*, 1880, 7 R. 778.

<sup>11</sup> *Sneddon v. Mossend Iron Co.*, 1876, 3 R. 868.

<sup>12</sup> *Lyell v. Cooper*, 1834, 13 S. 94.

<sup>13</sup> *M'Ewan v. Patterson*, 1865, 3 M. 779.

<sup>14</sup> *Gilmour v. Drysdale* (O.H.), 1905, 13 S.L.T. 433.

<sup>15</sup> *Burrell v. Simpson & Co.*, 1877, 4 R. 1133.



relevancy did not do so and the expenses of more than one appearance thereafter were refused.<sup>1</sup> In an action of reduction, where there were two defenders who put in separate defences and were assoilzied, the pursuer was found liable to pay the expenses of only one set of defences.<sup>2</sup> The expenses of more than one set of defences were refused, but the other defender was allowed a watching fee.<sup>3</sup> Where in a proving of the tenor of an I.O.U. the granter's representative appeared, but caused no extra expense.<sup>4</sup> Where objection to the competency was taken on the merits and not on the Single Bills.<sup>5</sup> Where a preliminary plea of the defenders was rejected and he was required to pay the expenses of the discussion, and the same plea was successful on the merits, repetition of the first expenses was refused.<sup>6</sup> Where the judgment was suggested by the Court.<sup>7</sup> Where the ground of judgment was not argued.<sup>8</sup> Where the successful appellant failed to quote to the Sheriffs the authorities deciding the point.<sup>9</sup> Where the point on which the successful party won was not stated on record.<sup>10</sup> Where the action should have been in an inferior Court.<sup>11</sup> Where the judgment was likely to entail great hardship to the unsuccessful party.<sup>12</sup> Where the erroneous return in an election petition was made without the fault of either candidate.<sup>13</sup> Where there has been unnecessary procedure, as where an unnecessary proof was led,<sup>14</sup> and where a petition was presented to apply an affirming judgment of the House of Lords.<sup>15</sup>

(d) *Successful Party found Liable.*

**1176.** This has been done in the following circumstances: Where the expenses have been occasioned by the improper conduct of the successful party in keeping back information;<sup>16</sup> or carelessness in not providing it;<sup>17</sup> where the successful party refused to account extra-judicially;<sup>18</sup> where the successful party threw obstacles in the way of

<sup>1</sup> *Duncan v. Salmond*, 1874, 1 R. 839.

<sup>2</sup> *Rooney v. Cormack*, 1895, 23 R. 11.

<sup>3</sup> *Stott v. Fender & Crombie*, 1878, 16 S.L.R. 5.

<sup>4</sup> *Borland v. Anderson's Factor*, 1901, 4 F. 129.

<sup>5</sup> *Steele v. M'Intosh Brothers*, 1879, 7 R. 192; *Ross v. Brims*, 1878, 15 S.L.R. 438.

<sup>6</sup> *M'Kenzie v. Houston*, 1830, 8 S. 526.

<sup>7</sup> *North of Scotland Banking Co. v. Fleming*, 1882, 10 R. 217; *Fairbairn v. Sanderson*, 1885, 13 R. 81.

<sup>8</sup> *Bartsch v. Poole & Co.*, 1895, 3 S.L.T. 205.

<sup>9</sup> *Mitchell v. Mackersey*, 1905, 8 F. 198; *Baker v. Corporation of Glasgow*, 1916 S.C. 199.

<sup>10</sup> *Mitchell v. Elgin School Board*, 1883, 10 R. 982; *Andrews v. Drummond & Graham*, 1887, 14 R. 568.

<sup>11</sup> *Gibson v. Milroy*, 1879, 6 R. 890; *Wilkie v. Alloa Rly. Co.*, 1884, 12 R. 219.

<sup>12</sup> *Trail v. Dangerfield*, 1870, 8 M. 579.

<sup>13</sup> *Haswell v. Stewart*, 1874, 1 R. 925.

<sup>14</sup> *Lord Clinton v. Brown*, 1874, 1 R. 1137.

<sup>15</sup> *Peters v. Mags. of Greenock*, 1893, 20 R. 924.

<sup>16</sup> *A.B. v. C.D.*, 1839, 1 D. 610.

<sup>17</sup> *Mags. of Dumbarton v. Edinburgh University (O.H.)*, 1909, 1 S.L.T. 51; *Baker v. Corporation of Glasgow*, 1916 S.C. 199.

<sup>18</sup> *Orr v. Melville*, 1872, 10 S.L.R. 81.

their servants being precognosced;<sup>1</sup> where the whole action was unnecessary in view of the reasonable attitude of the defender;<sup>2</sup> where the pleadings were imperfect;<sup>3</sup> where a plea was not taken *tempestive*;<sup>4</sup> where a small sum was awarded.<sup>5</sup> This rule is usually applied in actions to clear heritable titles.<sup>6</sup> Where an extrajudicial tender was made followed by a tender on record without expenses but in excess of sum recovered, the Court held that the successful party was unreasonable.<sup>7</sup> A *curator ad litem* to an unsuccessful claimant in a multiple-poining has been awarded expenses although other unsuccessful claimants have not.<sup>8</sup> A litigant is bound to quote to the Court an authority against himself in a previous litigation and on his failing to do so was found liable in expenses.<sup>9</sup> In actions of divorce an unsuccessful wife is usually entitled to her expenses.<sup>10</sup> Where pursuers raised an action for payment of money without making a previous demand, they were held liable in expenses.<sup>11</sup>

### (iii) *Divided Success.*<sup>12</sup>

**1177.** Where success is divided, expenses of parties have been dealt with in the following ways:—(1) The expenses of the more successful have been modified; (2) the more successful party has been given his expenses except upon a point where he has been unsuccessful; (3) each party has been given expenses upon the points on which each has been successful; and (4) neither party has been given expenses. It is not, however, a true case of divided success where a jury answered an issue and found it unnecessary to answer a counter-issue, and in such circumstances a motion to modify expenses so as to disallow the expenses relative to the counter-issue was refused.<sup>13</sup>

#### (a) *The More Successful Party's Expenses modified.*

**1178.** Where a pursuer sued for £70, 13s. for medical attendance and medicine, and the jury gave £50, 13s., expenses were modified from £214 to £150.<sup>14</sup> Where on a second jury trial the issue of the

<sup>1</sup> *Barrie v. Caledonian Rly. Co.*, 1902, 5 F. 30.

<sup>2</sup> *Mavor & Coulson v. Grierson*, 1892, 19 R. 868.

<sup>3</sup> *Orr v. Union Bank*, 1852, 15 D. 122.

<sup>4</sup> *Watt v. Kempt*, 1865, 3 M. 730.

<sup>5</sup> *Spr. All v. Walker*, 1899, 2 F. 73.

<sup>6</sup> *Leask v. Johnstone*, 1886, 24 S.L.R. 78; *Howard & Wyndham v. Richmond's Trs.*, 1890, 17 R. 990; *Walker v. Galbraith*, 1895, 23 R. 347; *Walter's Trs. v. O'Mara (O.H.)*, 1902, 9 S.L.T. 395; *Roscoe v. Mackersey*, 1905, 7 F. 761; *Harland Engineering Co. v. Stark's Trs.*, 1914, 2 S.L.T. 292; cf. *Lamb's Trs. v. Reid*, 1883, 11 R. 76.

<sup>7</sup> *Mavor & Coulson v. Grierson*, *supra*.

<sup>8</sup> *Dunlop v. Brown (O.H.)*, 1903, 11 S.L.T. 522, see para. 1315, *infra*; cf. *Rooney v. Cormack*, 1895, 23 R. 11.

<sup>9</sup> *Baker v. Corporation of Glasgow*, 1916 S.C. 199.

<sup>10</sup> *Milne v. Milne*, 1885, 13 R. 304, see paras. 1254 *et seq.*

<sup>11</sup> *Mags. of Leith v. Lennon*, 1881, 18 S.L.R. 313.

<sup>12</sup> *Maclaren*, p. 32; *Dean v. Walker*, 1873, 11 M. 759, per Lord Pres. Inglis.

<sup>13</sup> *Campbell v. Scottish Educational News Co., Ltd.*, 1906, 8 F. 691.

<sup>14</sup> *Webster v. Alexander*, 1859, 21 D. 1214.

first trial was restricted, and upon this latter issue the jury found for the pursuer.<sup>1</sup> Where the defenders were successful in the Sheriff Court on two grounds, and the Division recalled the judgment and assoltied the defenders upon the second ground alone, one-third of the expenses of the proof in the Sheriff Court was allowed.<sup>2</sup> Where a pursuer obtained a declarator of property, but subject to use by the defenders.<sup>3</sup> Where a pursuer sued for £150, which he averred was owing *quantum meruit*, and a jury gave £25.<sup>4</sup>

(b) *The More Successful Party given Expenses except upon a Point where unsuccessful.*

**1179.** A reclaimer was found entitled to expenses except those of a parole proof, which was unnecessary and in which he was unsuccessful.<sup>5</sup> A pursuer was allowed his expenses up to and including a trial where he was successful, but thereafter his expenses were refused.<sup>6</sup>

(c) *Each Party given his Expenses so far as successful.*

**1180.** Where the pursuers averred two grounds of reduction—(1) fraud, and (2) contravention of the Act, 1696, and were successful on the latter alone, they were held entitled to the expenses of the action, but the defenders were found entitled to their expenses in repelling the averment of fraud.<sup>7</sup> Where a pursuer averred (1) error in *essentialibus*, and (2) fraud, and succeeded in reducing a purchase on the first ground alone, he was found entitled to expenses, but the defender was given the expenses which he had incurred in defending himself from the second ground of action.<sup>8</sup>

(d) *Neither Party given Expenses.*

**1181.** Where a respondent opposed the competency of an appeal and was unsuccessful, but was successful on the merits.<sup>9</sup> Where pursuers sued for the full cost of a footpath and the defender was held bound to pay only one-third.<sup>10</sup> Where a pursuer failed in four out of five issues.<sup>11</sup>

(iv) *Reserved Expenses.*<sup>12</sup>

**1182.** By the 17th section of the Judicature Act it is provided that the Lord Ordinary in his judgment disposing of the merits “shall also

<sup>1</sup> *Smith v. Donington*, 1893, 1 S.L.T. 107.

<sup>2</sup> *Strang v. Brown & Son*, 1882, 19 S.L.R. 890.

<sup>3</sup> *Scott v. Mags. of Dundee*, 1886, 14 R. 191.

<sup>4</sup> *Smith v. West of Scotland Exchange Investment Co.*, 1847, 10 D. 213.

<sup>5</sup> *Lee v. Alexander*, 1882, 10 R. 230; *Sinclair v. Brown Brothers*, 1882, 10 R. 45.

<sup>6</sup> *Milne Home v. Police Commissioners of Dundee*, 1882, 9 R. 924.

<sup>7</sup> *Stoppel & Co. v. Maclaren & Co.*, 1850, 13 D. 345.

<sup>8</sup> *Johnston v. Smellie's Trs.*, 1856, 18 D. 1234.

<sup>9</sup> *Fleming v. North of Scotland Banking Co.*, 1882, 9 R. 659.

<sup>10</sup> *Dalkeith Police Commrs. v. Duke of Buccleuch*, 1889, 16 R. 575.

<sup>11</sup> *Dean v. Walker*, 1873, 11 M. 759.

<sup>12</sup> *Maclaren*, p. 35.



determine the matter of expenses." This does not imply that he shall finally decern for expenses, but that, in his judgment on the merits, he shall give or refuse expenses in whole or in part. While not strictly in accordance with this section, it has been held that the Lord Ordinary, in giving judgment on the merits, may, by the same interlocutor, reserve the question of expenses to be dealt with by a later interlocutor.<sup>1</sup> It is therefore clearly within the right of a judge to reserve the question of expenses of any incidental procedure or discussion until such time as a final judgment is arrived at, and this course has been sanctioned by a number of cases.<sup>2</sup> If the unsuccessful party does not bring the question of reserved expenses before the notice of the judge, a general finding for expenses will cover all questions reserved,<sup>3</sup> though it will not cover the repetition of expenses already paid to the opposite side where the latter has been successful on a preliminary plea.<sup>4</sup> If a reclaiming note or appeal on a matter incidental to a cause is taken to the Inner House, and thereafter a remit is made to the Lord Ordinary or the Sheriff, expenses are often reserved in order that the expenses of the appeal or reclaiming note may follow the decree disposing of expenses generally.<sup>5</sup> In reclaiming notes taken under s. 28 of the Court of Session Act, 1868, however, the Division must, at advising, dispose of the expenses of the reclaiming note and of the discussion before remitting to the Lord Ordinary to proceed as accords. In cases where a verdict is set aside on a bill of exceptions and a new trial is granted, the general rule is to reserve the question of expenses until the conclusion of the second trial or the end of the cause.<sup>6</sup>

## SECTION 2.—EXPENSES IN ORDINARY ACTION.

### SUBSECTION (1).—Outer House.

#### (i) *Motions.*<sup>7</sup>

**1183.** The expenses of unopposed motions are not dealt with at the time the motion is made, but when the cause is finally disposed of. The same holds good for opposed motions, except where the motion has reference to a point that is quite separable from the merits, when the Lord Ordinary may award expenses. Where a cause is enrolled in the motion roll and dropped without any motion being made, the auditor is bound to disallow the expense occasioned by such enrolment, unless he is satisfied that the cause was properly enrolled and properly dropped.<sup>8</sup>

<sup>1</sup> *Bannatine's Trs. v. Cunninghame*, 1872, 10 M. 317.

<sup>2</sup> *Macrae v. Sutherland*, 1889, 16 R. 476; *Kirkwood's Trs. v. Leith and Bremner*, 1888, 16 R. 255; *Christie v. Munro*, 1885, 23 S.L.R. 267.

<sup>3</sup> *Gardiners v. Victoria Estates Co.*, 1885, 13 R. 80; *Caledonian Rly. Co. v. Chisholm*, 1889, 16 R. 622; *Alston & Orr v. Allan*, 1910 S.C. 304; see para. 1163, *supra*.

<sup>4</sup> *M'Kenzie v. Houston*, 1830, 8 S. 520.

<sup>5</sup> *Macfie v. Blair*, 1884, 22 S.L.R. 224; *Tait's Trs. v. Lees*, 1886, 13 R. 1104; *North British Rly. Co. v. White*, 1881, 9 R. 97; *Robertson v. Cockburn*, 1875, 3 R. 21.

<sup>6</sup> Para. 1205.

<sup>7</sup> *Maclaren*, p. 44.

<sup>8</sup> A.S., 15th July 1865, s. 9; C.A.S., C, ii. 2.

The expense of one counsel is usually given, but in difficult cases a fee to senior counsel has been allowed.<sup>1</sup> Under a decree for expenses a successful party is not entitled to recover the expenses of a motion to dispense with printing.<sup>2</sup>

(ii) *Adjustment of Record.*<sup>3</sup>

**1184.** The fees of senior and junior counsel are allowed.<sup>4</sup> Two guineas have been allowed to junior counsel for adjusting the record in an action of reduction.<sup>5</sup> If the pursuer's agent fails to deliver the prints of the open record, the defender may enrol and obtain decree by default<sup>6</sup> against which the pursuer will only be reponed upon payment of expenses.<sup>7</sup>

(iii) *Closed Record.*<sup>8</sup>

**1185.** If the pursuer's agent fails to lodge prints of the closed record within the statutory period, the said agent's fee for the trouble connected with the closing is disallowed by the auditor to the extent of one-half, unless the failure has arisen from unavoidable accident. If neither party prints the closed record within twenty-one days, the cause is dismissed, and neither party is entitled to expenses.<sup>9</sup>

(iv) *Issues.*<sup>10</sup>

**1186.** The appointment for the lodging or adjustment of issues is peremptory,<sup>11</sup> and if issues are not lodged two days before the day fixed for their adjustment, the opposite party may take decree by default, which can only be reponed against on a reclaiming note.<sup>12</sup> In one case there was no reclaiming note, and the Court reponed upon payment of expenses from the date of the order for issues.<sup>13</sup> The expense of two counsel is allowed for the adjustment of issues<sup>14</sup> unless the adjustment is purely formal.<sup>15</sup>

(v) *Procedure Roll.*<sup>16</sup>

**1187.** If the dilatory defences are sustained, the Lord Ordinary determines the matter of expenses. If the dilatory defences are repelled, the Lord Ordinary does not pronounce any interlocutor dealing with expenses, but reserves this part of the expenses to be disposed of in the

<sup>1</sup> Mackay, ii. 589.

<sup>2</sup> *Ralston v. Dennistoun Sausage Works*, 1916 S.C. 222.

<sup>3</sup> Maclaren, p. 45.

<sup>4</sup> *Sandilands v. Mercer*, 1833, 11 S. 733; *Stott v. M'William*, 1856, 18 D. 716; *Arthur v. Lindsay*, 1895, 22 R. 904; *Gunn v. Muirhead*, 1899, 2 F. 10.

<sup>5</sup> *Robertson v. Ramsay* (O.H.), 1911 1 S.L.T. 27.

<sup>6</sup> Court of Session Act, 1868, s. 26.

<sup>7</sup> Paras. 1231 *et seq.*

<sup>8</sup> Maclaren, p. 45.

<sup>9</sup> C.A.S., C, ii. 6.

<sup>10</sup> Maclaren, p. 45.

<sup>11</sup> C.A.S., C, iv. 2 (e).

<sup>12</sup> A.S., 18th March 1870, s. 1 (5).

<sup>13</sup> *Glen v. Thomson*, 1901, 4 F. 154.

<sup>14</sup> *Dunlop v. Lambert*, 1840, 2 D. 646; *Gardiner v. Black*, 1851, 13 D. 843.

<sup>15</sup> *Barrie v. Scottish Motor Traction Co.*, 1920 S.C. 704.

<sup>16</sup> Maclaren, p. 46.

final decision of the cause. The Judicature Act prescribes that if the defender intimates his intention to reclaim, the Lord Ordinary shall forthwith determine the matter of expenses (which he usually modifies), and that if the defender does not reclaim within ten days, an *interim* decree, with expenses of extract, will be allowed to go out for the expenses so fixed and modified.<sup>1</sup> This procedure is, however, not followed in practice, and frequently a reclaiming note is taken against an interlocutor repelling a preliminary plea without the expense of the discussion having been determined. The expense of two counsel is allowed on the procedure roll. If the counsel on both sides, or on one side only, fail to appear, and a decree of dismissal is given by the Lord Ordinary, neither party gets expenses. This decree of dismissal can be recalled only by reclaiming note upon such terms as to expenses and otherwise as may be imposed by the Court, or by the Lord Ordinary under remit.<sup>2</sup> Reponing will not take place as a matter of course.<sup>3</sup> It is a question of circumstances whether refreshers are allowed on the procedure roll.<sup>4</sup> The expenses of amendments necessitated by a procedure roll discussion will be discussed later.<sup>5</sup>

(vi) *Report*.<sup>6</sup>

**1188.** When the Lord Ordinary reports a case to the Inner House, the latter either settles the expenses relative to the point so reported, or reserves consideration thereof to the end of the case.<sup>7</sup>

(vii) *Res Noviter*.<sup>8</sup>

**1189.** In the course of a cause either party may state matter of fact *noviter veniens ad notitiam*, on cause shewn, the said party paying, previous to stating such new matter, such expenses as may be deemed reasonable by the Lord Ordinary or the Court.<sup>9</sup>

(viii) *Commission to Examine Witnesses, and Diligence for the Recovery of Documents*.<sup>10</sup>

**1190.** The expenses of such commission must, in the first place, be defrayed by the party asking for it, but ultimately they follow the event. There is no general rule that when a diligence is unsuccessful the expenses should be disallowed. But unsuccessful defenders have been held not to be liable for the expenses of a commission which was

<sup>1</sup> Judicature Act, 1825, 6 Geo. IV. c. 120, s. 5.

<sup>2</sup> C.A.S., C, ii. 9 (A.S., 2nd Nov. 1872, ss. 1 and 2).

<sup>3</sup> *Ferguson v. M'Duff*, 1878, 5 R. 1016; *Yeaman v. Caledonian Property Investment Society*, 1883, 20 S.L.R. 777; *Bedfordshire Loan Co. v. Russell*, 1909, 47 S.L.R. 116. See para. 1231.

<sup>4</sup> *Lord Advocate v. Dunlop's Trs.*, 1894, 2 S.L.T. 375.

<sup>5</sup> Paras. 1215 *et seq.*

<sup>7</sup> Judicature Act, 1825, s. 19.

<sup>9</sup> Judicature Act, 1825, s. 10.

<sup>6</sup> Maclaren, p. 48.

<sup>8</sup> Maclaren, p. 71.

<sup>10</sup> Maclaren, pp. 492 *et seq.*



not reasonably necessary.<sup>1</sup> Expenses have been allowed where no documents have been recovered<sup>2</sup> and where the documents recovered did not establish the allegations sought to be proved.<sup>3</sup>

(ix) *Proof*.<sup>4</sup>

**1191.** The expenses of the proof follow success. If, however, it appears that there is any part of the proof in which the successful party has proved unsuccessful, or that any part of the proof has been occasioned by his fault, the successful party is not allowed the expenses of such part.<sup>5</sup> Where a proof was held to be unnecessary, expenses were refused to the successful party,<sup>6</sup> and where the proof was considered too long, one-half of the expenses were disallowed.<sup>7</sup> If, in order to succeed, additional proof is required, the expenses of the additional proof will not be allowed to the successful party.<sup>8</sup> In one case, where additional proof was allowed, the expenses were reserved.<sup>9</sup>

(x) *Judgment*.<sup>10</sup>

**1192.** The fees of one counsel are generally allowed, though in the Inner House fees to senior and junior counsel have been given occasionally.<sup>11</sup>

(xi) *Discussions on Expenses*.<sup>12</sup>

**1193.** The fees of one counsel are usually allowed,<sup>13</sup> but in important cases the fees of senior and junior counsel have been given.<sup>14</sup> It is peremptory that the expenses of the discussion upon the Auditor's report<sup>15</sup> should be given at the time.<sup>16</sup> Where the action was one by a law agent pursuing for his business account, a fee was allowed to counsel for moving the approval of the Auditor's report and the agent was allowed to charge for instructing him.<sup>17</sup> Counsel's fee for moving for remit to taxing master has been allowed in addition to fee for moving for approval of his report.<sup>18</sup>

<sup>1</sup> *Speirs v. Caledonian Rly. Co.*, 1921 S.C. 889.

<sup>2</sup> *M'Leod v. Leslie*, 1868, 5 S.L.R. 687.

<sup>3</sup> *Stirling v. Dunn*, 1831, 9 S. 562.

<sup>4</sup> Maclaren, p. 47.

<sup>5</sup> A.S., 15th July 1876, Regulation V. See para. 1168, *supra*.

<sup>6</sup> *Clinton v. Brown*, 1874, 1 R. 1137.

<sup>7</sup> *Ralston v. Caledonian Rly. Co.*, 1875, 5 R. 671.

<sup>8</sup> *Cairns v. Boyd*, 1879, 6 R. 1004.

<sup>9</sup> *Coul v. Ayr County Council*, 1909 S.C. 422.

<sup>10</sup> Maclaren, p. 55.

<sup>11</sup> *Lyell v. Mudie*, 1829, 8 S. 153; *Lord Advocate v. Raynes, Lupton & Co.*, 1859, 21 D. 863.

<sup>12</sup> Maclaren, p. 460.

<sup>13</sup> *Samuel v. Edinburgh and Glasgow Rly. Co.*, 1852, 14 D. 790.

<sup>14</sup> *Crawcour v. St. George Steam Packet Co.*, 1844, 6 D. 762.

<sup>15</sup> Maclaren, p. 424.

<sup>16</sup> A.S., 6th Feb. 1806.

<sup>17</sup> *Newlands v. Gillanders (O.H.)*, 1905, 42 S.L.R. 571, 12 S.L.T. 825.

<sup>18</sup> *Debenham v. Gillanders (O.H.)*, 1907, 15 S.L.T. 549.

SUBSECTION (2).—*Inner House—Reclaiming Notes.*(i) *Against a Final Judgment.*<sup>1</sup>

**1194.** A reclaiming note against a final judgment must be presented within twenty-one days, and “the Inner House shall, in deciding the cause, also determine the question of expenses.”<sup>2</sup> This provision is not merely directory, but must be acted upon;<sup>3</sup> and if the judgment on the reclaiming note exhausts the merits, and is silent on the question of expenses, the Court has no power thereafter to make an award.<sup>4</sup> A final judgment is defined by the Court of Session Act, 1868, s. 53. If the Outer House judgment does not deal with the question of expenses, it is not a final judgment.<sup>5</sup> It is still a question whether an interlocutor disposing of the merits and of expenses already incurred is an interlocutor disposing of the whole case.<sup>6</sup> An interlocutor modifying expenses is a final judgment.<sup>7</sup> An interlocutor finding a party entitled to expenses subject to modification has been held to be a final judgment.<sup>8</sup> The whole law relating to this subject was considered in *Inglis v. National Bank of Scotland, Ltd.*<sup>9</sup> There an interlocutor disposing of the merits of a case and finding one of the parties entitled to expenses, but reserving as to modification thereof, was held to be a final interlocutor. Two courses are open to the unsuccessful party: he may either reclaim against the first interlocutor as such or he may await the subsequent interlocutor dealing with expenses and reclaim against it. In both cases the decision on the merits will be submitted to review. But it is different if the interlocutor is one dealing with expenses in a way merely executorial.<sup>10</sup>

(ii) *Against an Allowance, Refusal, or Postponement of Proof.*

**1195.** This is regulated by ss. 27 and 28 of the Court of Session Act, 1868, as amended by Act of Sederunt,<sup>11</sup> and the Statute Law Revision Act, 1893. The reclaiming note must be presented within six days, and when it is advised, the Inner House must dispose of the expenses of the reclaiming note and of the discussion, and will remit the cause to the Lord Ordinary to proceed as accords. An interlocutor restricting the mode of proof does not fall within these sections and can be

<sup>1</sup> Maclaren, pp. 49 *et seq.*<sup>2</sup> 6 Geo. IV. c. 120, s. 21.<sup>3</sup> *Wilson's Trs. v. Wilson's Factor*, 1869, 7 M. 457.<sup>4</sup> *Macdonald v. M'Eachan*, 1880, 7 R. 574.<sup>5</sup> *Baird v. Barton*, 1882, 9 R. 979; *Burns v. Waddell & Son*, 1897, 24 R. 325; *Caledonian Rly. Co. v. Corporation of Glasgow*, 1900, 2 F. 871.<sup>6</sup> *Caledonian Rly. Co. v. Corporation of Glasgow*, *supra*.<sup>7</sup> *Crellin's Trs. v. Muirhead's Judicial Factor*, 1893, 21 R. 21; *Taylor's Trs. v. M'Gavigan*, 23 R. 738.<sup>8</sup> *Earl of Kintore v. Pirie & Son*, 1904, 42 S.L.R. 5, 12 S.L.T. 385.<sup>9</sup> 1911 S.C. 6.<sup>10</sup> Para. 1198, *infra*.<sup>11</sup> C.A.S., C, ii. 5.

reclaimed against more than six days thereafter,<sup>1</sup> but a reclaiming note against the granting or refusal of issues does.<sup>2</sup>

(iii) *Against an Interlocutor disposing of Dilatory Defences.*<sup>3</sup>

**1196.** When dilatory defences are sustained, and the action dismissed with expenses, the pursuer may reclaim within ten days, and the Inner House, on advising the reclaiming note, must dispose of the matter of expenses relative to the preliminary discussion.<sup>4</sup> If the dilatory defences are repelled, the defender may reclaim within ten days, and if the Inner House adheres to the Lord Ordinary's interlocutor repelling the defences, an interim decree will be pronounced for the expenses decerned for by the Lord Ordinary with the additional expenses in the Inner House, if such be allowed, on which interim execution may proceed.<sup>5</sup> An interlocutor of the Lord Ordinary disposing of some but not all of the dilatory defences is not an interlocutor falling under this section, and can only be reclaimed against with leave.<sup>6</sup>

(iv) *Against other Interlocutory Judgments.*<sup>7</sup>

**1197.** All other interlocutory judgments require the leave of the Lord Ordinary in order that they may be reclaimed against. If leave is granted, a reclaiming note must be lodged within ten days, and when it is advised by the Inner House "the Court shall pronounce such judgment or order as they shall think fit."<sup>8</sup> If the judgment or order of the Inner House does not deal with the question of expenses, and the case is remitted to the Lord Ordinary for further procedure, the Inner House expenses form part of the general expenses in the cause, to be dealt with by the Auditor in the usual way.<sup>9</sup>

(v) *Against an Interlocutor approving of the Auditor's Report.*<sup>10</sup>

**1198.** Where there has been no objection to the Auditor's report, which has been approved of and decree given for the expenses as taxed, an appeal against such an interlocutor is incompetent.<sup>11</sup> Such an interlocutor is merely executorial and the only question really remaining is that of the report. Where there are no written objections to the Auditor's report, but objections appear *ex facie* of the report, an appeal is competent.<sup>12</sup>

<sup>1</sup> *Stewart v. Clark*, 1871, 9 M. 616.

<sup>2</sup> *Mason v. Stewart*, 1877, 4 R. 513.

<sup>3</sup> *Maclaren*, pp. 46, 50.

<sup>4</sup> See *Tennant v. Fyfe*, 1874, 11 S.L.R. 418.

<sup>5</sup> 6 Geo. IV. c. 120, s. 5.

<sup>6</sup> *Kennedy v. Wise*, 1890, 17 R. 1036.

<sup>7</sup> *Maclaren*, pp. 49 *et seq.*

<sup>8</sup> Court of Session Act, 1868, ss. 54 and 55.

<sup>9</sup> *Crabbe & Robertson v. Stubbs, Ltd.*, 1896, 3 S.L.T. 235.

<sup>10</sup> *Maclaren*, p. 55.

<sup>11</sup> *Tennents v. Romanes*, 1881, 8 R. 824; *Thompson & Co. v. King*, 1883, 10 R. 469; *Stirling Maxwell's Trs. v. Kirkintilloch Police Commrs.*, 1883, 11 R. 1; *Inglis v. National Bank of Scotland, Ltd.*, 1911 S.C. 6.

<sup>12</sup> *Innes v. M'Donald*, 1899, 1 F. 380.



(vi) *Other Interlocutors.*

**1199.** Interlocutors which have become final through mistake or inadvertence, and decrees by default in respect of failure to print the closed record or to lodge issues, or in respect of the failure of counsel to attend in the Procedure Roll, are dealt with under the subject of reponing.<sup>1</sup> The subjects of abandonment and amendment are also treated below.<sup>2</sup>

SECTION 3.—JURY TRIALS.<sup>3</sup>SUBSECTION (1).—*Generally.*

**1200.** The first rule of expenses in jury trials is that if a pursuer obtains a verdict for less than £5 he is not entitled to expenses unless the judge certifies that the action was brought to try a right besides the mere right to receive damages, or that the injury was malicious, or, in the case of actions for defamation or for libel, that the action was brought for the vindication of character, and was, in his opinion, fit to be tried in the Court of Session.<sup>4</sup> The certificate having been obtained, the question of expenses is brought within the discretion of the Court.<sup>5</sup> The Court may then grant full expenses,<sup>6</sup> or it may modify them.<sup>7</sup>

**1201.** The second rule used to be that if a pursuer obtained a verdict for £5 or over he was entitled to full expenses, the only qualification being in cases founded upon *quantum meruit*, where, if the verdict was for less than the sum sued for, the expenses of the pursuer were modified.<sup>8</sup> This rule, however, suffered from so many exceptions that it was gradually replaced by the practice of considering the special circumstances of each case. Recognition of this practice was completed in *Ridley v. Kimball & Morton, Ltd.*,<sup>9</sup> and *Gorman v. Hughes*.<sup>10</sup> Shortly after the judgment in the latter case, the Act of Sederunt, 20th March 1907, was passed, s. 8 of which provides<sup>11</sup>—“When the pursuer in any action of damages in the Court of Session, not being an action of damages for defamation or for libel, or an action which is competent only in the Court of Session, recovers, by the verdict of a jury, £5, or any sum above £5 but less than £50, he shall not be entitled to charge more than one-half of the taxed amount of his expenses, unless the judge before whom the verdict is obtained shall certify that he shall be entitled to recover any larger proportion of his expenses, not exceeding

<sup>1</sup> Paras. 1231 *et seq.*<sup>3</sup> Maclaren, pp. 93 *et seq.*<sup>5</sup> *Winn v. Quillan*, 1899, 2 F. 322.<sup>6</sup> *Craig v. Jex-Blake*, 1871, 9 M. 973; *Bonnar v. Roden*, 1887, 14 R. 761; *Macmillan v. Wilsons*, 1887, 15 R. 6; *Winn v. Quillan*, *supra*; *Williamson v. McCann* (O.H.), 1908, 16 S.L.T. 518; *Dawson v. Giffen*, 1915, 53 S.L.R. 48; 2 S.L.T. 256.<sup>7</sup> *Rogers v. Dick*, 1864, 2 M. 591. (This case is prior to the 1868 Act, but the rule was then substantially the same); *Graham v. Napier*, 1874, 1 R. 391.<sup>8</sup> *Smith v. West of Scotland Exchange Investment Co.*, 1847, 10 D. 213; *Webster v. Alexander*, 1859, 21 D. 1214.<sup>9</sup> 1905, 7 F. 655.<sup>10</sup> 1907 S.C. 405.<sup>11</sup> C.A.S., F, iii. 3.<sup>2</sup> Paras. 1215 and 1223 *et seq.*<sup>4</sup> Court of Session Act, 1868, s. 40.

two-third parts thereof." This provision does not affect actions competent only in the Court of Session or actions raised to clear character, the expenses of which still remain within the discretion of the Court to deal with according to their special circumstances. In all other cases, however, a verdict for a sum ranging from £5 to £50 cannot now possibly carry more than two-thirds expenses, and this latter proportion is dependent entirely upon a certificate granted to that effect by the judge. If the certificate is not granted, the pursuer can only obtain one-half of his taxed expenses.

**1202.** While this provision limits the amount of expenses obtainable by a pursuer who recovers a sum of £5 and less than £50 in a jury trial, other than those excepted, it does not limit the discretion possessed by the Court to modify or refuse the expenses so limited, if the circumstances, such as have already been detailed,<sup>1</sup> call for such treatment. Where a pursuer who was injured in a street accident brought an action for damages in the Court of Session concluding for £120, but obtained a verdict for only £35, the presiding judge refused to certify that the pursuer was entitled to recover more than one-half expenses. On the pursuer's moving for expenses to that amount, the defenders moved that expenses should be reduced to the Sheriff Court scale. The Court held that it was competent to modify the expenses to an amount less than one-half or to refuse expenses altogether if the justice of the case demanded it, but in the circumstances of the particular case refused such further modification. The Lord President observed that the application of the Sheriff Court scale to such actions in the Court of Session was not sanctioned by practice.<sup>2</sup> This limitation of expenses by the Act of Sederunt of 1907 does not apply to the expenses in the Sheriff Court of a case originating there and transferred to the Court of Session for jury trial and there tried,<sup>3</sup> nor to separate verdicts each for less than £50, where these verdicts are obtained in one action and with one defence, and where the total of the verdicts exceeds £50,<sup>4</sup> in both of which cases full expenses were allowed. It was applied, however, to a case where the pursuer asked for damages on two issues—(1) slander, and (2) wrongous imprisonment—and was allowed an issue upon the latter, and only got a verdict for £10.<sup>5</sup>

#### SUBSECTION (2).—*Postponement of Trial.*

**1203.** The postponement of a jury trial is regulated by Act of Sederunt,<sup>6</sup> which provides for the payment by the party asking a postponement of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial.<sup>7</sup> In a case where the motion for postponement was made on the day of the trial, the Court

<sup>1</sup> Paras. 1173 *et seq.*, *supra*.

<sup>2</sup> *Paterson v. M'Vitie & Price, Ltd.*, 1923 S.C. 37.

<sup>3</sup> *Geddes v. A. & J. M'Lellan*, 1908, S.C. 941.

<sup>5</sup> *Hughes v. Morgan*, 1910 S.C. 712.

<sup>6</sup> C.A.S., F, i. 14.

<sup>4</sup> *Hughes v. Allen*, 1909 S.C. 1210.

<sup>7</sup> *Maclaren*, p. 100.

granted a postponement on the condition that the pursuer paid such expenses as the defender had incurred by appearing, and as would not be available for a postponed trial.<sup>1</sup> In another case the following fees were allowed as proper expenses: (1) Consultation fee to counsel; (2) agent's fee for attending consultation; and (3) half fee to agent for preparing for trial.<sup>2</sup> The effect of failure to proceed to trial and of abandonment are noticed below.<sup>3</sup>

#### SUBSECTION (3).—*Jurors.*

**1204.** Jurors are paid by the unsuccessful party,<sup>4</sup> but in one case where a pursuer got less than the sum tendered, the judge directed that in the first instance the jury should be paid by the parties equally.<sup>5</sup> For these fees agents are personally liable. The expense of refreshments to a jury, but not to counsel and agents, during the trial form an item of charge between party and party.<sup>6</sup>

#### SUBSECTION (4).—*New Trial.*

**1205.** Where a new trial is granted the rule now is that the question of the expenses of the first trial is reserved until the conclusion of the second trial.<sup>7</sup> In *Miller's Tr. v. Shield*<sup>8</sup> Lord Pres. M'Neill laid down as a general rule that when a party is unsuccessful in the first trial, and on a new trial is successful and given the expenses of the second trial, he cannot claim the expenses of the first. This rule has been adhered to in various cases,<sup>9</sup> and the expenses of the first trial were given to neither party. Circumstances may occur to overcome this rule, and in the undernoted cases, where there were different verdicts in the first and second trials, the successful party in the second trial was found entitled to the expenses of both trials.<sup>10</sup> Where there has been the same verdict in both trials the Court has awarded the successful party the expenses of both trials.<sup>11</sup> In some cases,<sup>12</sup> however, the expenses of the first trial were refused to the party successful in both. From these decisions it is obvious that no hard-and-fast rule or rules regarding the expenses of a

<sup>1</sup> *Hamilton v. Hull*, 1906 (O.H.), 13 S.L.T. 756.

<sup>2</sup> *White v. Grieve*, 1867, 5 S.L.R. 77.

<sup>4</sup> *Maclaren*, p. 104.

<sup>3</sup> *Paras. 1223 et seq., infra.*

<sup>5</sup> *Kerr v. Murray*, 1866, 2 S.L.R. 249.

<sup>6</sup> *Caledonian and Dumbartonshire Rly. Co. v. Lockhart*, 1858, 20 D. 390.

<sup>7</sup> *Maclaren*, p. 101; *Frasers v. Edinburgh Street Tramways Co.*, 1882, 10 R. 264; *Macdonald v. Wyllie & Son*, 1898, 1 F. 339; *Canavan v. Green & Co.*, 1906, 8 F. 827.

<sup>8</sup> 1868, 1 M. 380.

<sup>9</sup> *Cleland v. Weir*, 1848, 10 D. 964; *Barns v. Allan & Co.*, 1864, 3 M. 269; *Stewart v. Caledonian Rly. Co.*, 1870, 8 M. 486.

<sup>10</sup> *Neilson v. Leighton*, 1844, 6 D. 728; *Great Northern Rly. Co. v. Inglis*, 1853, 2 Stuart 529; *Lyell v. Gardyne*, 1867, 6 M. 42; *M'Bride v. Williams*, 1869, 7 M. 790; *Gibson v. Nimmo & Co.*, 1895, 22 R. 491.

<sup>11</sup> *M'Quilkin v. Glasgow District Subway Co.*, 1902, 4 F. 462; *Canavan v. Green & Co.*, *supra*.

<sup>12</sup> *Miller v. Hunter*, 1865, 4 M. 78; *Stewart v. Caledonian Rly. Co.*, 1870, 8 M. 486; *Grant v. Baird & Co., Ltd.*, 1903, 5 F. 459.



first trial can be laid down, and that each case must be regarded according to its special circumstances.<sup>1</sup>

**1206.** Where a motion for a rule to set aside a verdict was refused the Court allowed a fee of two guineas to the opposing party's junior counsel for attending that motion but disallowed a fee to his senior for that attendance and also disallowed a fee to his junior for attendance when the motion was sent to the summar roll,<sup>2</sup> but where the rule has been granted, the expenses of discussing the rule form part of the expenses of the trial sought to be set aside.<sup>3</sup> Where a pursuer obtained an award of £250 and the defenders applied for a new trial on the ground of excessive damages, but subsequently both parties agreed to abide by the decision of the Court as to the amount of damages to be awarded, the Court fixed the damages at £125 and granted the pursuer full expenses save the expenses in connection with the motion for a new trial.<sup>4</sup> In an appeal to the Court of Session by a defender to set aside a verdict given by a jury in the Sheriff Court, on the ground that it was contrary to evidence, the Court set aside the verdict and ordered a new trial, and found the pursuer liable in the expenses of the appeal.<sup>5</sup>

#### SECTION 4.—APPEALS.

##### SUBSECTION (1).—*Against a Final Judgment.*

**1207.** A final judgment is defined by s. 53 of the Court of Session Act, 1868.<sup>6</sup> If expenses have not been dealt with in the judgment, an appeal is incompetent.<sup>7</sup> In a petition for the division of the area of a parish church among heritors, it was held that the heritors of a disjoined *quoad sacra* parish were not heritors as regards the division, and, though the question of expenses was not dealt with, an appeal was held competent in respect that the interlocutor disposed of the whole matter of the competition so far as the appellants were concerned.<sup>8</sup> If expenses have been awarded subject to modification, the interlocutor is a final one, and so also is an interlocutor modifying the expenses already found due,<sup>9</sup> but an appeal cannot be taken against an interlocutor which merely gives decree for expenses already found due.<sup>9</sup> If there is a decree of absolvitor with expenses, and decree for expenses alone is extracted, the decree of absolvitor may be appealed, if within the statutory period.<sup>10</sup> If the appeal from a final interlocutor is an appeal merely on the question

<sup>1</sup> *Canavan v. Green & Co.*, *supra*, per Lord Kinnear.

<sup>2</sup> *M'Govern v. West Calder Co-operative Society, Ltd.*, 1914 S.C. 674.

<sup>3</sup> *Conolly v. North British Rly. Co.*, 1908 S.C. 422.

<sup>4</sup> *Reid v. Scottish Catholic Printing Co.*, 1908 S.C. 667.

<sup>5</sup> *Bond v. Dalmeny Oil Co., Ltd.*, 1909, 46 S.L.R. 920, 1909, 2 S.L.T. 146; *Reid v. James Nimmo & Co.*, 1913 S.C. 1002.

<sup>6</sup> 31 & 32 Vict. c. 100; *Maclaren*, p. 55.

<sup>7</sup> *Parochial Board of Greenock v. Miller & Brown*, 1877, 4 R. 737; *Russell v. Allan*, 1877, 5 R. 22; *Malcolm v. M'Intyre*, 1855, 5 R. 22.

<sup>8</sup> *Duke of Roxburghe*, 1875, 2 R. 715.

<sup>9</sup> Paras. 1194 and 1198, *supra*.

<sup>10</sup> *Macfarlane v. Thompson*, 1884, 12 R. 232.

of expenses, it is quite competent, though the Court does not encourage it.<sup>1</sup> Where a proprietor brought an action in the Sheriff Court to interdict a creditor, and a sheriff-officer whom the latter had employed, from selling certain goods which had already been sequestrated for rent, and ultimately restricted her conclusions to a case for expenses, which were decerned for, the sheriff-officer appealed, and it was held that the expenses were the merits, and that the appeal was competent.<sup>2</sup>

SUBSECTION (2).—*For Reponing against a Decree by Default.*<sup>3</sup>

**1208.** An appeal to be reponed is usually allowed upon payment of expenses from the date of default.<sup>4</sup> It is not, however, allowed as a matter of course.<sup>5</sup>

SUBSECTION (3).—*For Jury Trial.*<sup>6</sup>

**1209.** This is now, strictly speaking, a motion for removal to the Court of Session for jury trial, and when it comes before the Division the question of relevancy or competency may be discussed in the same manner as any other appeal.<sup>7</sup> If at the adjustment of issues the defender unsuccessfully objects to the relevancy of the action, the pursuer will be found entitled to the expenses of the discussion.<sup>8</sup> Sec. 40 of the Judicature Act, 1825, and s. 73 of the Court of Session Act, 1868, have been repealed by the Sheriff Courts (Scotland) Act, 1907, so far as those sections relate to appeals from the Sheriff Court, and s. 30 of the latter Act, with the Act of Sederunt,<sup>9</sup> now regulate the procedure. When the process is remitted to the Court of Session, the same regulations as to printing, boxing, lodging, etc., apply as in the case of ordinary appeals, the only difference being in the terms of the docquet written by the Clerk of Court when the case is abandoned and retransmitted. Where the latter takes place, the Sheriff decerns for a payment of £3, 3s. to the respondent. This latter provision does not interfere with the right of the Court to award such expenses as they consider just under Rule 96 of Schedule I. of the Sheriff Courts (Scotland) Act, 1907.<sup>10</sup> The Court is unwilling to remit cases back to the Sheriff Court unless where it is clear that the verdict of the jury would be less than £50.<sup>11</sup> When they are remitted back, the Court will either find the appellants

<sup>1</sup> Para. 1154, *supra*.

<sup>2</sup> *Wyllie v. Fisher*, 1907 S.C. 686.

<sup>3</sup> *Maclaren*, p. 54, see para. 1231, *infra*.

<sup>4</sup> *Vickers & Sons v. Nibloe*, 1877, 4 R. 729; *M'Carthy v. Emery*, 1897, 24 R. 610.

<sup>5</sup> *M'Gibbon v. Thomson*, 1877, 4 R. 1085.

<sup>6</sup> *Maclaren*, p. 53.

<sup>7</sup> *Ellerman Lines, Ltd. v. Clyde Navigation Trs.*, 1909 S.C. 694.

<sup>8</sup> *Warwick v. Caledonian Rly. Co.*, 1897, 24 R. 429.

<sup>9</sup> C.A.S., D, iv.

<sup>10</sup> *M'Guire v. Union Cold Storage Co., Ltd.*, 1909 S.C. 384.

<sup>11</sup> *Sharples v. Yuill & Co.*, 1905, 7 F. 657; *M'Laughlan v. Clyde Valley Electrical Power Co.*, 1905, 8 F. 131; *Greer v. Corporation of Glasgow*, 1915 S.C. 791; *Monaghan v. United Co-operative Baking Society*, 1917 S.C. 12; *Brown v. Campbell*, 1924 S.C. 1048.

liable in the expenses of the appeal,<sup>1</sup> or remit to the Sheriff to grant a proof, and to proceed in the cause as shall seem just.<sup>2</sup>

SUBSECTION (4).—*Amendment of Record on Appeal.*<sup>3</sup>

1210. This is sometimes allowed without payment of expenses,<sup>4</sup> sometimes upon payment of expenses from the closing of the record.<sup>5</sup> Sometimes the expenses are modified.<sup>6</sup> In any event, the question of the expenses of the amendment should be dealt with at once, not postponed till the end of the case.<sup>7</sup> The appellant may be found liable for the expense of correcting defects in the print.<sup>8</sup> The subject of abandonment is noticed below.<sup>9</sup>

SUBSECTION (5).—*Against a Verdict in the Sheriff Court.*

1211. So far as the decisions have gone, the rule reserving expenses of actions tried in the Court of Session until the end of the second trial is not observed. In one case the Court set aside a verdict of a jury on the ground of misdirection, and ordered a new trial, and in respect that both parties were more or less to blame for the appeal, found neither party entitled to expenses from the date of closing the record;<sup>10</sup> and in another case where a verdict for the pursuer was set aside as contrary to evidence, and a new trial granted, the pursuer was found liable in the expenses of the appeal.<sup>11</sup> Where the Court set aside a verdict for the pursuer and granted a new trial on the ground that the verdict had been erroneously applied and was contrary to the evidence, the pursuer was found liable in the expenses of the appeal.<sup>12</sup>

SUBSECTION (6).—*Miscellaneous.*

1212. A general finding of expenses includes those incurred in the Court of Session and the Sheriff Court.<sup>13</sup> An interlocutor dismissing the appeal, but making no award of expenses, does not carry the expenses of the appeal.<sup>14</sup> If no expenses are awarded, the Sheriff cannot afterwards deal with the matter, unless it is remitted to him for further procedure.<sup>15</sup> According to s. 28 of the Sheriff Court Act of 1907, an

<sup>1</sup> *Smellies v. Whitelaw*, 1907, 44 S.L.R. 586, 14 S.L.T. 865.

<sup>2</sup> *Kennedy v. Bruce*, 1907 S.C. 845.

<sup>3</sup> *Maclaren*, p. 69, see para. 1220.

<sup>4</sup> *Sutherland v. Mags. of Aberdeen*, 1894, 22 R. 95.

<sup>5</sup> *Keith v. Outram & Co.*, 1877, 4 R. 958; *Gallagher v. Pattison*, 1891, 19 R. 79.

<sup>6</sup> *Cochrane v. Russell*, 1891, 28 S.L.R. 697; *Macdonald v. Forsyth*, 1898, 25 R. 870.

<sup>7</sup> *Thornton v. Boyd & Forrest*, 1907 S.C. 390.

<sup>8</sup> *Roxburgh & Co. v. Barlas*, 1876, 3 R. 288 (£2, 2s. allowed).

<sup>9</sup> *Paras. 1223 et seq.*

<sup>10</sup> *M'Coll v. Alloa Coal Co.*, 1909, 46 S.L.R. 465; 1909, 1 S.L.T. 282.

<sup>11</sup> *Bond v. Dalmeny Oil Co., Ltd.*, 1909, 46 S.L.R. 920; 1909, 2 S.L.T. 146.

<sup>12</sup> *Reid v. James Nimmo & Co., Ltd.*, 1913 S.C. 1002.

<sup>13</sup> *Halbert v. Bogie*, 1857, 19 D. 762.

<sup>14</sup> *Macdonald v. M'Eachan*, 1880, 7 R. 574.

<sup>15</sup> *M'Gillivray v. Mackintosh*, 1891, 19 R. 103.



interlocutor (a) granting interim decree for payment of money other than a decree for expenses, or (b) sisting an action, may be appealed against without leave, and the Sheriff or Sheriff-Substitute has power, either *ex proprio motu* or on the motion of any party, to grant leave to appeal against any other interlocutory judgment. A Sheriff Court interlocutor which *ad interim* sists process to enable the pursuers to find caution for expenses has been held to be an interlocutor sisting process.<sup>1</sup> The expenses of appeals against interlocutory judgments may either be dealt with by the Division, or on advising the appeal the Court may remit to the inferior Court to proceed in the cause as shall seem just. The rule that expenses not dealt with by the Division cannot be awarded afterwards does not extend to interlocutory judgments.<sup>2</sup> Objection to the competency of an appeal must be taken on Single Bills. If it is not so taken, the respondent, even if successful, will be refused expenses.<sup>3</sup>

## SECTION 5.—INCIDENTS OF ALL FORMS OF PROCESS.

### SUBSECTION (1).—*Sist*.<sup>4</sup>

**1213.** Where a party has been ordered to sist himself and has done so, he may be found liable in expenses, though he is not mentioned in the conclusions of the summons.<sup>5</sup> If a party asks to be allowed to sist himself and does not thereafter do so, he may be found liable in all the expenses caused by his action.<sup>6</sup> A trustee in bankruptcy who sists himself in place of the bankrupt is liable for all expenses, antecedent and subsequent.<sup>7</sup> Where a trustee in bankruptcy had to be sisted in an action, the expenses of such sisting were held to be expenses in the cause.<sup>8</sup>

### SUBSECTION (2).—*Disclamation*.<sup>9</sup>

**1214.** If a party disclaims timeously, he is not liable in the expenses of a cause.<sup>10</sup> If, however, counsel has appeared for a party, the latter is liable in expenses in the first place, though he may have relief against those who have used his name without authority.<sup>11</sup> The agent who instructs an action without authority will be liable, if unsuccessful, not only for the expenses of the opposite side but also of the person for whom he holds himself out to appear.<sup>12</sup> The party moving for expenses against such an agent must prove that the latter had no

<sup>1</sup> *Horn & Co. Ltd. v. Tangyes, Ltd.*, 1906, 8 F. 475.

<sup>2</sup> *Crabbe & Robertson v. Stubbs, Ltd.*, 1896, 3 S.L.T. 235.

<sup>3</sup> *Houston v. Gault*, 1925 S.C. 429.

<sup>4</sup> *Maclaren*, p. 88.

<sup>5</sup> *Boyd v. Lang*, 1832, 10 S. 213.

<sup>6</sup> *Jarvis v. Wotherspoon*, 1844, 7 D. 128.

<sup>7</sup> *Torbet v. Borthwick*, 1849, 11 D. 694; *Ellis v. Ellis*, 1870, 8 M. 805.

<sup>8</sup> *Barron v. Black (O.H.)*, 1908, 16 S.L.T. 180.

<sup>9</sup> *Maclaren*, p. 9.

<sup>10</sup> *Cowan v. Farme*, 1836, 14 S. 634.

<sup>11</sup> *Thomson v. Incorporation of Candlemakers of Edinburgh*, 1855, 17 D. 774.

<sup>12</sup> *Cowan v. Farme, supra*; *M'Call v. Sharp and Bayne*, 1862, 24 D. 393.

authority.<sup>1</sup> Where the agent does not produce a written mandate when called upon to do so, or refuses to give information showing that he was, *rebus ipsis et factis*, authorised to appear, he will be found liable in expenses.<sup>2</sup> Where a party and his agent raised an action in the name of two nominal pursuers, of whom one disclaimed and a mandate from the other was not produced, the action was dismissed, and the party and agent were found liable, conjunctly and severally, in expenses.<sup>3</sup> Where an action was raised in name of a committee of nine, and three of their number disclaimed, the latter were held entitled to have their names deleted from the record, with expenses against the remaining pursuers, who had, without authority, used their names.<sup>4</sup> When a minute of disclaimer by a pursuer, which dates back to the raising of the action, is sustained, it is held that there has never been a process before the Court,<sup>5</sup> and accordingly a minute to sist another party as pursuer in such circumstances was dismissed with expenses.<sup>6</sup> In a case where the defender lodged a minute of disclaimer, the Lord Ordinary, in respect that the matter was of such small moment that he refused a proof of the disputed facts, sustained the minute, and reserved the disclaimer's right to constitute his claim for expenses of the minute of disclaimer and of relief from any possible liability to the pursuer, against the person or persons who had used his name without authority.<sup>7</sup>

#### SUBSECTION (3).—*Amendment.*

##### (i) *Generally.*<sup>8</sup>

**1215.** The amendment of the record and issues in defended causes is provided for by s. 29 of the Court of Session Act, 1868, as amended by Act of Sederunt, 20th March 1907.<sup>9</sup> By the former Act all such amendments as are necessary for determining the real question in controversy between the parties shall be made upon such terms as to expenses or otherwise as to the Court or Lord Ordinary shall seem proper. By the latter Act the powers of the Court or Lord Ordinary as regards amendment are much enlarged. It is limited, however, to actions initiated in the Court of Session.<sup>10</sup>

##### (a) *Instance.*

**1216.** The instance of a summons may now be amended in the following ways: The character in which a party sues or is sued may be amended from a representative character to suing or being sued in

<sup>1</sup> *Noble v. Mags. of Inverness*, 1825, 3 S. 516.

<sup>2</sup> *Philip v. Gordon*, 1848, 11 D. 175.

<sup>3</sup> *Ferguson, Davidson & Co. v. Paterson & Dobbie*, 1898, 1 F. 227.

<sup>4</sup> *Cambuslang West Church Committee v. Bryce*, 1897, 25 R. 322.

<sup>5</sup> *Ferguson, Davidson & Co. v. Paterson & Dobbie*, *supra*.

<sup>6</sup> *Gordon v. Purves*, 1902, 10 S.L.T. 446; 1903, 11 S.L.T. 38.

<sup>7</sup> *Cassidy v. Bilsland* (O.H.), 1907, 15 S.L.T. 615.

<sup>8</sup> *Maclaren*, p. 66.

<sup>9</sup> C.A.S., B, 1.

<sup>10</sup> *Paterson v. Wallace*, 1909 S.C. 20.

his own right; another person may be sisted as pursuer in substitution for or in addition to the original pursuer; and an insufficient or incorrect name or description of a party may be corrected. These amendments may be made on such terms as to the Court or Lord Ordinary may seem proper. Where all parties are not called, the pursuer may be allowed to insert in the summons the name of an additional defender, provided that the pursuer shall be liable to the original defender for any expenses incurred by the latter through such failure to call all the parties, unless cause be shewn to the contrary, and the payment of said expenses by the pursuer shall be a condition precedent of the pursuer being allowed to proceed, unless cause be shewn to the contrary as aforesaid.<sup>1</sup> The expenses may be modified.<sup>2</sup>

(b) *Conclusions.*

1217. A pursuer may increase the sum for which he is suing, and may also conclude for a larger or different remedy than that originally craved. In the former case the amendment shall be allowed in all cases where it is competent to raise a supplementary action, but in all other cases it is in the discretion of the Court or Lord Ordinary. In the latter case such amendment shall only be allowed on such terms as to expenses as to the Court or Lord Ordinary shall seem proper.<sup>3</sup>

(c) *Discretion.*

1218. The power thus given is to be exercised according to the personal judgment of the Court or Lord Ordinary before whom the question may arise. The Inner House will not be prepared to interfere with his judgment in such a matter.<sup>4</sup>

(ii) *Outer House.*

1219. The general rule is that radical amendments are only allowed upon payment of expenses from the date of closing the record.<sup>5</sup> Where a new defence is set up by way of amendment, the pursuer is entitled to be placed in the same position as if the new defence had been stated at the proper time, *i.e.* the closing of the record. Such an amendment is, therefore, only allowed to be made on payment of all expenses down to the closing of the record; or the pursuer may be allowed to abandon his action and receive expenses from the closing of the record.<sup>6</sup>

<sup>1</sup> C.A.S., B, 1.

<sup>2</sup> *Kennedy v. Shotts Iron Co., Ltd.* (O.H.), 1910, 2 S.L.T. 329; and see *Klein v. Lindsay* (O.H.), 1909, 1 S.L.T. 89.

<sup>3</sup> C.A.S. B, 1, 6.

<sup>4</sup> *Brown's Trs. v. Hay*, 1897, 24 R. 1108, per Lord McLaren.

<sup>5</sup> *Thomson v. Hughson & Co.*, 1861, 23 D. 679; *Cruikshank v. Fairlie*, 1863, 1 M. 928; *Gray v. Scottish Society for Prevention of Cruelty to Animals*, 1890, 17 R. 789; McLaren, pp. 69, 71.

<sup>6</sup> *Thomson v. Hughson & Co.*, *supra*; *Keith v. Outram & Co.*, 1877, 4 R. 958.



In an action for the reduction of an award of an arbiter, the Lord Ordinary reduced the award on a ground which emerged at the proof and for which the record contained no foundation. On a reclaiming note, the First Division held that the new ground of reduction had not been established. On appeal the House of Lords affirmed the judgment of the First Division, but held further that without amendment of the record and payment of expenses by the pursuer, it would not have been permissible to give judgment in his favour upon the new ground of reduction which had emerged.<sup>1</sup> If the amendment is not a radical alteration, it may be allowed upon payment of modified expenses,<sup>2</sup> or without payment of expenses.<sup>3</sup> In one case, the defender after payment of £25 in respect of an amendment was unsuccessful, and it was held that she was entitled to set off the £25 against the expenses in the action which she required to pay.<sup>4</sup>

(iii) *Inner House.*

**1220.** In the Inner House there is no inflexible rule; the practice is discriminating and has regard to the quality of the amendment.<sup>5</sup> Where a new defence emerges,<sup>6</sup> or an irrelevant appeal has to be made relevant,<sup>7</sup> or one set of pursuers has to be struck out,<sup>8</sup> full expenses will be exacted. But where no radical alteration is made the Court will make less onerous conditions.<sup>9</sup> Sometimes expenses are modified, as, for example, where a new defence has been put forward,<sup>10</sup> or a slight alteration made,<sup>11</sup> or where the omission to found upon a bill was rectified,<sup>12</sup> or where an amendment was made to ensure a record being relevant.<sup>13</sup> Sometimes no expenses are exacted, as where a pursuer wished to amend but was prevented by successive appeals from doing so.<sup>14</sup> In peculiar circumstances an appellant and defender was allowed to amend his record upon finding caution for the estimated expenses which had been lost through the amendment. This was an exceptional

<sup>1</sup> *Black v. John Williams & Co.*, 1924 S.C. (H.L.) 22; "*Vitruvia*" *Steamship Co. v. Ropner Shipping Co.*, 1924 S.C. (H.L.) 31.

<sup>2</sup> *Davidson v. Renton*, 1902, 10 S.L.T. 479.

<sup>3</sup> *Reach v. Wallace*, 1899, 1 F. 718; *Watt v. Smith's Trs.* (O.H.), 1901, 9 S.L.T. 215.

<sup>4</sup> *Macleod v. Heritors of Morvern*, 1869, 7 M. 1103.

<sup>5</sup> *Murdison v. Scottish Football Union*, 1896, 23 R. 449.

<sup>6</sup> *Keith v. Outram & Co.*, 1877, 4 R. 958; *Morgan Gellibrand & Co. v. Dundee Gem Line Steamship Co.*, 1890, 18 R. 205; *Guinness, Mahon & Co., v. Coats Iron and Steel Co.*, 1891, 18 R. 441; *Stevens v. Motherwell Entertainers*, 1914 S.C. 957; *Black v. John Williams & Co.*, 1924 S.C. (H.L.) 22.

<sup>7</sup> *Murdison v. Scottish Football Union*, *supra*; *Reach v. Wallace*, *supra*.

<sup>8</sup> *Gallagher v. Patterson*, 1891, 19 R. 79.

<sup>9</sup> *Paxton v. Brown*, 1908 S.C. 406

<sup>10</sup> *Cameron v. Chisholm-Batten*, 1869, 7 M. 565. Expenses modified to eight guineas; *Cochrane v. Russell*, 1891, 23 S.L.R. 697, expenses modified to fifteen guineas.

<sup>11</sup> *Macdonald v. Forsyth*, 1898, 25 R. 870 (one guinea).

<sup>12</sup> *Bank of Scotland v. W. & G. Fergusson*, 1898, 1 F. 96.

<sup>13</sup> *Thornton v. Boyd & Forrest*, 1907 S.C. 390, expenses modified to six guineas.

<sup>14</sup> *Sutherland v. Mags. of Aberdeen*, 1894, 22 R. 95.

case.<sup>1</sup> Where an amendment was allowed after a proof had been heard, the pursuer was found liable in two-thirds of the expenses of the proof and all the other expenses thereafter.<sup>2</sup> The observations made by the House of Lords in *Black v. John Williams & Co.* and the "*Vitruvia*" must be kept in mind.<sup>3</sup>

(iv) *Payment of Expenses a Condition Precedent.*

1221. There is no inflexible rule, but if the amendment is of importance and alters the case, payment of the expenses awarded as a condition of amendment is a condition precedent.<sup>4</sup> Where a pursuer was allowed to amend his record and to proceed in the cause only on payment of the expenses of the amendment and failed to pay the expenses, the defenders were assolizied.<sup>5</sup>

(v) *In Undefended Causes.*

1222. The amendment is made in writing upon the summons or pleading, or in a separate paper, and is authenticated by the signature of counsel. The amended summons or other pleading may be ordered to be served upon the absent defender, with liberty to the latter to enter appearance, but the expenses of such amendment shall not be chargeable against the defender.<sup>6</sup>

SUBSECTION (4).—*Abandonment.*

(i) *Under the Judicature Act, 1825.*

1223. Under the Judicature Act, 1825, s. 10, and relative Act of Sederunt, 11th July 1828, s. 115, after the record is closed and before an interlocutor assolizieing the defender, in whole or in part, has been pronounced, the pursuer may abandon his action, and raise a new one if otherwise competent. The condition is the payment of the defender's full expenses, an account of which is sent to the auditor to be taxed.<sup>7</sup> "Full expenses" means expenses as between party and party, and the Court has no power to modify.<sup>8</sup> If the pursuer fails to pay the taxed amount of expenses within a reasonable time, he is held to have abandoned his cause in terms of s. 46 of Act of Sederunt, 1841, and the defender is entitled to absolvitor.<sup>9</sup> In *Stewart v. Stewart*,<sup>10</sup> opinions were expressed that payment of "full expenses" required by the Act

<sup>1</sup> *Paton v. M'Knight*, 1897, 24 R. 554.

<sup>2</sup> *Brown v. Ross*, 1899, 2 F. 38.

<sup>3</sup> Para. 1219, *supra*.

<sup>4</sup> *Morgan Gellibrand & Co. v. Dundee Gem Line S.S. Co.*, 1890, 18 R. 205; *Haughton v. North British Rly. Co.*, 1892, 20 R. 113.

<sup>5</sup> *Dougall v. Caledonian Rly. Co.*, 1913 S.C. 349.

<sup>6</sup> Court of Session Act, 1868, s. 20.

<sup>7</sup> *Maclaren*, p. 57.

<sup>8</sup> *Lockhart v. Lockhart*, 1845, 7 D. 1045; *Mica Insulator Co., Ltd., v. Bruce Peebles & Co., Ltd.*, 1907 S.C. 1293.

<sup>9</sup> *Ross v. Mackenzie*, 1889, 16 R. 871; *Donnelly v. Morrison (O.H.)*, 1895, 2 S.L.T. 582.

<sup>10</sup> 1906, 8 F. 769.

as the condition of abandonment involves repayment by the pursuer of any expenses paid to the pursuer by the defender in respect of the former's success on a preliminary plea, as well as payment of the taxed amount of the defender's expenses in the cause. But in a later case it was held that the "full expenses" to which a defender is entitled under this section, when the pursuer abandons after the record is closed, cover only the expenses, but without modification, which he would have recovered if assoilzied with expenses, and do not entitle him to expenses previously awarded against him or to repayment of the sums which he had paid to the pursuer under the award.<sup>1</sup> Where a cause was abandoned before a formal order for proof was made, it was held that the expenses fell to be taxed as if an order for proof had been made.<sup>2</sup>

(ii) *Under the Court of Session Act, 1868, s. 39.*

**1224.** This applies only to jury trials, which may be abandoned in course of a trial at any time before the judge has commenced charging the jury, upon payment of full expenses, in which case a new action may be raised. Leave of the judge is necessary, and in granting such leave the judge must specify the time within which the expenses shall be paid, and if they are not so paid, the defender is entitled to be assoilzied, with expenses.

(iii) *Failure to Proceed.*<sup>3</sup>

**1225.** If it is made to appear that a party has abandoned his suit, or if the pursuer does not proceed to trial within twelve months after issues have been finally approved, the Court shall proceed therein as in cases in which parties are held as confessed, *i.e.* the defender will be assoilzied, with expenses,<sup>4</sup> unless sufficient cause be shewn for the delay to the satisfaction of the Court. Again, if either party fails to appear at the trial, the party appearing, if pursuer, is entitled to lead his evidence and go to the jury for a verdict, but if the party appearing is a defender he shall be entitled to a verdict in his favour without leading evidence. If, however, the party appearing declines to proceed as aforesaid, the presiding judge shall certify to the Division, and the party failing to appear shall be dealt with as confessed, unless sufficient cause be shewn to the contrary. This Act of Sederunt applies to new trials as well as first trials.<sup>5</sup> It does not apply where the delay has been occasioned by the engagements of the Lord Ordinary.<sup>6</sup> The notour bankruptcy of the defender is not sufficient cause for the pursuer's

<sup>1</sup> *Nobel's Explosives Co. v. British Dominions General Insurance Co.*, 1919 S.C. 455.

<sup>2</sup> *Mica Insulator Co., Ltd., v. Bruce Peebles & Co., Ltd.*, *supra*.

<sup>3</sup> C.A.S., F, iv. 4; A.S., 16th February 1841, ss. 41 and 46.

<sup>4</sup> *Bett v. Aberdeen*, 1853, 16 D. 322; *Kerr v. Boswell's Reps.*, 1858, 20 D. 959.

<sup>5</sup> *Russell v. MacKnight's Trs.*, 1900, 2 F. 520; *Smith v. Dixon, Ltd.*, 1910 S.C. 230; but see *Macfarlane v. Beattie & Son*, 1892, 19 R. 953.

<sup>6</sup> *Baird v. Cornelius*, 1881, 8 R. 982.



delay in proceeding to trial.<sup>1</sup> It is not now necessary to report to the Inner House, in order to obtain absolvitor.<sup>1</sup> Abandonment of a cause may be inferred from circumstances.<sup>2</sup>

**1226.** Where the appellant fails to print and box the note of appeal within fourteen days after the process has been received by the Clerk of Court, he is held to have abandoned the appeal,<sup>3</sup> and if within eight days thereafter he has not been reponed, the process is retransmitted with a certificate, in respect of which the Sheriff grants payment to the respondent of £3, 3s. as expenses. There appears to be the same allowance of £3, 3s. to the respondent in the case of an application for remission of a Sheriff Court case to the Court of Session as in appeals.<sup>4</sup>

(iv) *Under the Sheriff Court Act, 1907.*

**1227.** The provision of Rule 96 of the First Schedule to the Sheriff Courts Act, 1907, is not affected by the Codifying Act of Sederunt, and seems to be a simple recognition of the common-law right which the Court has always exercised, and which is referred to in the next paragraph. The Appellate Court has complete discretion as to expenses.<sup>5</sup>

(v) *At Common Law.*

**1228.** The Court has a common-law right to grant leave to abandon. This right has been exercised before the record has been closed,<sup>6</sup> in which case full expenses were allowed. It appears to be the general rule that where the pursuer so abandons, the defender is entitled to full expenses.<sup>7</sup> But in one case where the action was abandoned on the procedure roll expenses were modified.<sup>8</sup> Leave to withdraw or abandon an appeal or reclaiming note may be granted in the exercise of this right. Formerly the practice in regard to appeals or reclaiming notes varied. In some cases the party abandoning was found liable in expenses,<sup>9</sup> but there were cases where modification was made.<sup>10</sup> After some diversity of practice and judicial opinion the whole matter was considered in *H. R. Marshall, Ltd. v. Brunton & Sons*<sup>10</sup> and it was authoritatively laid down that as a general rule when a motion is made for the

<sup>1</sup> *Hampton v. Mitchell*, 1885, 12 R. 969.

<sup>2</sup> *Gilhooly v. M'Hardy*, 1897, 24 R. 1185; *Mooney v. Dixon*, 1897, 24 R. 1187.

<sup>3</sup> C.A.S., D, iii; A.S., 10th March 1870, s. 3.

<sup>4</sup> C.A.S., D, iv; A.S., 5th January 1909.

<sup>5</sup> *M'Guire v. Union Cold Storage Co., Ltd.*, 1909 S.C. 384.

<sup>6</sup> *Caledonian Iron and Foundry Co. v. Clyne*, 1831, 10 S. 133.

<sup>7</sup> *Speedie v. Blyth*, 1854, 16 D. 375; *Bookless Brothers v. Godmundsson*, 1921 S.C. 602; *Legal and General Assurance Society v. Carter (O.H.)*, 1926 S.L.T. 63.

<sup>8</sup> *Hare v. Stein*, 1882, 9 R. 910.

<sup>9</sup> *Smith Sligo v. Knox*, 1880, 8 R. 41, 18 S.L.R. 39; *Little Ormes Head Limestone Co. v. Henry & Co.*, 1897, 25 R. 124; *M'Guire v. Union Cold Storage Co., Ltd.*, *supra*.

<sup>10</sup> *Johnston v. Rae*, 1876, 3 R. 879; *Stark v. M'Neil*, 1877, 5 R. 196; *Davidson v. Allen*, 1878, 5 R. 763; *Gentles v. Beattie*, 1880, 8 R. 13; *Craig v. Marshall & Co., Ltd.*, 1898, 1 F. 67; *Robertson v. Robertson's Exr.*, 1899, 2 F. 77; *MacLachlan v. Mackay*, 1899, 2 F. 163; *Henderson v. Menzies*, 1900, 3 F. 858; *Gilchrist & Co. v. Smith*, 1900, 3 F. 329.

refusal of a reclaiming note or an appeal which has already been sent to the roll, the respondent will be allowed in the case of a reclaiming note, two guineas, and in the case of an appeal, three guineas, of expenses. But in certain exceptional circumstances the Court will remit to the Auditor to tax the respondent's account. A party abandoning must bear the expenses of discharging an inhibition laid on by him in dependence on the action.<sup>1</sup>

(vi) *In Consistorial Causes.*

**1229.** Where a husband abandoned his action before closing the record upon payment of expenses, and the latter remained unpaid, decree of absolvitor was refused to the wife.<sup>2</sup> In an action of adherence and for aliment at the wife's instance, who abandoned the action, she was found entitled to expenses.<sup>3</sup> In a similar case, where the wife abandoned and did not ask for expenses, her agent did so and was refused.<sup>4</sup>

(vii) *Withdrawal of Abandonment.*

**1230.** When a pursuer withdraws a minute of abandonment he is allowed to proceed if he can shew that he acted in *bona fide*, and on condition that he has paid the taxed amount of the expenses occasioned to the defender by the pursuer's minute of abandonment and its subsequent withdrawal.<sup>5</sup>

SUBSECTION (5).—*Reponing.*

**1231.** A pursuer may be reponed against protestation for not calling on payment of £3, 3s.,<sup>6</sup> and a defender against a decree in absence on payment of £2, 2s.<sup>7</sup> Where an action has been dismissed because of the pursuer's failure to deliver proof prints of the open record<sup>8</sup> or because of the failure of both parties to lodge copies of the closed record they may be reponed by reclaiming note upon such conditions as to expenses or otherwise as may be imposed by the Court.<sup>9</sup> If the action has been dismissed in respect of failure of counsel to attend in the procedure roll, the conditions are the same as in the preceding case. The Court does not repon here as a matter of course.<sup>10</sup> In one case<sup>11</sup> the Court imposed a penalty of 14 guineas, to be paid before

<sup>1</sup> *Robertson v. Park, Dobson & Co.*, 1896, 24 R. 30.

<sup>2</sup> *Nicholson v. Nicholson* (O.H.), 1902, 10 S.L.T. 464.

<sup>3</sup> *Murray v. Murray* (O.H.), 1893, 1 S.L.T. 260; *Thorburn v. Thorburn*, 1862, 1 S.L.R. 191.

<sup>4</sup> *Elliott v. Elliott* (O.H.), 1893, 1 S.L.T. 261.

<sup>5</sup> *Todd & Higginbotham v. Corporation of Glasgow*, 1879, 16 S.L.R. 718; *Dalgleish v. Mitchell*, 1886, 23 S.L.R. 552; *Lee v. Pollock's Trs.*, 1906, 8 F. 857; and see further, 1907 S.C. 211.

<sup>6</sup> 13 & 14 Vict. c. 36, s. 23.

<sup>7</sup> 31 & 32 Vict. c. 100, s. 23.

<sup>8</sup> *Ibid.*, s. 26.

<sup>9</sup> C.A.S., C, ii. 6.

<sup>10</sup> *Ferguson v. M'Duff*, 1878, 5 R. 1016; *Yeaman v. Caledonian Property Investment Building Society*, 1883, 20 S.L.R. 777; C.A.S., C, ii. 9; see para. 1187, *supra*.

<sup>11</sup> *Bedfordshire Loan Co. v. Russell*, 1909, 47 S.L.R. 116.

being reponed. Where a decree by default has been taken by a party in respect of the failure of the counsel on the other side to appear in the procedure roll, it is not competent for the decree to be recalled by consent of parties. A reclaiming note is necessary, and, unless the Court directs otherwise, it is the duty of the Auditor, in taxing any account of expenses incurred to his agent by the party against whom such decree is taken, to disallow the expenses of having such decree opened up.<sup>1</sup> Where a pursuer sought to be reponed against a decree by default in respect of failure to lodge issues in terms of Act of Sederunt the Court reponed on payment of expenses from the date of the order for issues.<sup>2</sup>

**1232.** A party may be reponed against an interlocutor of the Lord Ordinary where the reclaiming days have been allowed to expire through mistake or inadvertence. The procedure is regulated by statute.<sup>3</sup> Parties can only be reponed on payment of the expenses previously incurred by the other party.<sup>4</sup> The Court has no discretion in the matter. An exception, however, is made where a wife seeks to be reponed in an action between her and her husband.<sup>5</sup> The procedure with regard to reponing against abandonment of an appeal in consequence of failure to print and box the note of appeal is regulated by Act of Sederunt,<sup>6</sup> and the motion will only be granted upon cause shewn and upon such conditions as to printing and payment of expenses as may seem just. £2, 2s. is usually exacted.<sup>7</sup> The provision of the Judicature Act<sup>8</sup> requiring delivery of six copies of a reclaiming note to the known agent of the opposite party has been held to be directory and not imperative to the effect of rendering the reclaiming note incompetent. In *Campbell's Trs. v. Campbell*<sup>9</sup> the case was sent to the roll, and there was no finding as regards expenses. In the case of *Smith v. Allan & Son*<sup>10</sup> the motion for dismissal of the reclaiming note was refused, and the mover of the motion was found liable in £2, 2s. modified expenses. In *Burroughes & Watts, Ltd. v. Watson*,<sup>11</sup> the reclaiming note was allowed to be put to the roll on the payment of £2, 2s. by the claimer.

**1233.** Besides the power given by Act of Sederunt, 11th July 1828, s. 72, as amended by s. 51 of the Court of Session Act, 1868, the Court has a power at common law to repon against a decree by default of any kind.<sup>12</sup> The granting of reponing and on what terms are questions

<sup>1</sup> C.A.S., C, ii. 9.

<sup>2</sup> *Glen v. Thomson*, 1901, 4 F. 154.

<sup>3</sup> 48 Geo. III. c. 151, s. 16.

<sup>4</sup> *Stewart v. Lang*, 1828, 6 S. 488 (note); *M'Ra v. Birtwhistle's Trs.*, 1831, 9 S. 582; *Bennet v. Pyper*, 1833, 11 S. 414.

<sup>5</sup> *Steedman v. Steedman*, 1887, 14 R. 682.

<sup>6</sup> C.A.S., D, iii. 4.

<sup>7</sup> *Greig v. Sutherland*, 1880, 8 R. 41; *Donald v. Irvine*, 1904, 6 F. 612; *White v. Rothesay Tramways Co.*, 1909 S.C. 760.

<sup>8</sup> 10 Geo. IV. c. 120, s. 18.

<sup>9</sup> 1868, 6 M. 563.

<sup>11</sup> 1910 S.C. 727.

<sup>10</sup> 1891, 29 S.L.R. 28.

<sup>12</sup> *Glen v. Thomson*, 1901, 4 F. 154.



entirely within the discretion of the Court.<sup>1</sup> Reponing is sometimes refused.<sup>2</sup> It is sometimes granted with full expenses to the opposite party.<sup>3</sup> Expenses are sometimes modified.<sup>4</sup> Expenses are sometimes found due to or by neither party.<sup>5</sup>

**1234.** Parties on the poor's roll are subject to the payment of expenses upon reponing, unless the decree pronounced has gone out from the inability of the party to furnish the necessary information, and not from the fault or neglect of the agent in the cause or the wilful neglect of the pauper himself.<sup>6</sup>

#### SUBSECTION (6).—*Tender.*

**1235.** A tender is thus described by Lord Justice-Clerk Inglis in *Ramsay's Trs.*<sup>7</sup> "A tender, in the proper sense of the term, is a judicial offer—that is, an offer by a party to pay a part of the sum asked by his adversary after the action is raised. Offers before litiscontestation are not tenders. Tenders are of two kinds: The defender comes into Court and tenders a part of the debt sued for, admitting that part to be due; or, disputing that any part of the sum claimed is due, he yet makes a tender for the sake of peace. In the first case, the ordinary course is to make the tender on record, admitting the pursuer's claim to a certain extent, and tendering the sum admitted. But when the tender is made without any admission, and for the sake of bringing peace, it is imprudent and unusual to make the tender on record; it ought to be made by a separate minute. I should say nothing to interfere with the general rule, though it may not be inflexible, that every such tender should be by a minute lodged in process, for this reason, that the sufficiency of the minute depends upon the precise terms at the time when it is made, and it should, therefore, form a distinct step in procedure, in order that a perfect record may be kept at the time when it is lodged and of its terms, and it is only consonant to general practice and regular procedure that parties engaged in litigation should speak through the process."

**1236.** A tender must be clear, absolute, and unqualified<sup>8</sup> and must

<sup>1</sup> *Arthur v. Bell*, 1866, 4 M. 841; *Anderson v. Garson*, 1875, 3 R. 254.

<sup>2</sup> *Arthur v. Bell*, *supra*; *Trs. of the Free Tron Church v. Morrison*, 1876, 13 S.L.R. 384; *M'Gibbon v. Thomson*, 1877, 4 R. 1085; *Yeaman v. Caledonian Property Investment Building Society*, 1883, 20 S.L.R. 777; *Lanarkshire County Council v. Motherwell Commissioners*, 1901, 4 F. 151.

<sup>3</sup> *Anderson v. Garson*, *supra*; *Morrison v. Smith*, 1876, 4 R. 9; *M'Carthy v. Emery*, 1897, 24 R. 610.

<sup>4</sup> *Halligan v. Scottish Legal Life Assurance Society*, 1883, 10 R. 972; *Bainbridge v. Bainbridge*, 1879, 6 R. 541.

<sup>5</sup> *Robertson v. Johnston*, 1908 S.C. 383, 15 S.L.T. 765; *Liquidator of Gael Iron Co., Ltd.*, *v. Orr*, 1884, 12 R. 345; *Duff v. Stuart*, 1882, 9 R. 423.

<sup>6</sup> *Maclaren*, p. 79; C.A.S., A, x. 14.

<sup>7</sup> *Ramsay's Trs. v. Souter*, 1864, 2 M. 891.

<sup>8</sup> *Bisset v. Anderson*, 1847, 10 D. 233; *Gunn v. Marquis of Breadalbane*, 1849, 11 D. 1046; *Low v. Spencers, Ltd.* (O.H.), 1895, 3 S.L.T. 170; *Henry Thomson & Co. v. Daily (O.H.)*, 1896, 4 S.L.T. 172.

be accompanied by an offer of expenses.<sup>1</sup> In one case<sup>2</sup> it was held by Lord Stormonth-Darling that a tender made in the defences need not be accompanied by an offer of expenses if the defender has offered the same sum before *litiscontestatio*, but in a later case<sup>3</sup> Lord Ardwall was unable to concur in this opinion. A tender, to be available in an action of slander, must be accompanied by the fullest retraction, so as to clear the pursuer of the slander in the same way as a verdict would have done.<sup>4</sup> A hypothetical apology in these terms, "He was not conscious of having made use of the expression . . . but if in the course of his dealings . . . he made use of the expressions complained of . . . he now unreservedly retracts and expresses his regret," coupled with a tender, was held sufficient.<sup>5</sup> A hypothetical apology which was accepted was held to be equivalent to a verdict of a jury, and though no expenses were tendered with the apology, expenses were given to the pursuer.<sup>6</sup>

**1237.** When a tender giving expenses down to the date of tender is accepted, the pursuer is entitled to the expense of counsel advising upon its acceptance.<sup>7</sup> The expenses of taking precognitions are only allowed where an action has reached the stage of an interlocutor allowing proof<sup>8</sup> and it follows that, as a general rule, a pursuer is not entitled to the expense of taking precognitions if the tender is made and accepted prior to the adjustment of issues.<sup>9</sup> This latter rule was given effect to in one case where the tender was lodged after proof was ordered but before the interlocutor was signed,<sup>10</sup> but in a later case, where the pursuer obtained an order for proof, and the defender, before the interlocutor granting the order was signed, lodged a tender which was accepted, the pursuer was allowed the expense incurred by him in preparation for the proof.<sup>11</sup> The same course was followed where it was inevitable that a proof should be ordered, but the formal order had not been made.<sup>12</sup> In an action of damages, where the defenders on the day prior to the adjustment of issues intimated a tender, and on the following day lodged the principal minute, the tender was accepted; it was held that the Auditor was justified in allowing the expense of precognitions.<sup>13</sup> A Sheriff Court action was remitted to the Court of Session for jury trial; an order having been pronounced to lodge issues within eight days, the

<sup>1</sup> *Little v. Burns*, 1881, 9 R. 118; *Gunn v. Hunter*, 1886, 13 R. 573.

<sup>2</sup> *Nash v. Smith* (O.H.), 1894, 2 S.L.T. 318.

<sup>3</sup> *Addison v. Kellock*, 1906, 14 S.L.T. 410.

<sup>4</sup> *Faulks v. Park*, 1854, 17 D. 247.

<sup>5</sup> *Mitchells v. Nicol*, 1890, 17 R. 795; cf. *Sprole v. Walker*, 1899, 2 F. 73.

<sup>6</sup> *Hunter v. Russell*, 1901, 3 F. 596; *Davidson v. Park*, 1915, 1 S.L.T. 273; cf. *Sturrock v. Dees & Co.*, 1913, 1 S.L.T. 60.

<sup>7</sup> *M'Dougall v. Caledonian Rly. Co.*, 1875, 5 R. 1011; *Nixon v. North British Rly. Co.* (O.H.), 1882, 20 S.L.R. 160; *Irvin v. Fairfield Shipbuilding Co.*, 1899, 1 F. 595.

<sup>8</sup> *M'Clymont v. Corporation of Glasgow*, 1913 S.C. 870.

<sup>9</sup> *Church v. Caledonian Rly. Co.*, 1883, 11 R. 398; cf. C.A.S., 1913, K, iv. Appendix II., General Regulation No. 3.

<sup>10</sup> *Walker v. Barclay* (O.H.), 1909, 1 S.L.T. 500.

<sup>11</sup> *Boyle v. Olsen*, 1913 S.C. 112.

<sup>12</sup> *Mica Insulator Co., Ltd.*, 1907 S.C. 1293.

<sup>13</sup> *Allan v. Bell Bros.* (O.H.), 1927 S.L.T. 213.

pursuer, within that time, accepted a tender and was found entitled to expenses; the First Division, after consultation with the judges of the Second Division, held that the defenders were liable for the expenses of precognitions obtained by the pursuer in preparation for the proof while the case was pending in the Sheriff Court, on the ground that the case had reached the stage in the Sheriff Court when such expenses were properly incurred.<sup>1</sup> A reasonable time is allowed for the acceptance of the tender.<sup>2</sup> In one case<sup>3</sup> a tender was lodged on Monday, 21st June, and accepted on 26th June. The Court, however, held that a reasonable date for acceptance was the 24th, and gave the pursuer expenses down to the latter date, and the defenders were awarded their expenses after that date.

**1238.** The following are the general rules which the Court has followed in dealing with the question of expenses where a tender has been made: (1) If a pursuer, though he gets less than he sued for, recovers more than the amount of the tender, he is entitled to full expenses. This rule was laid down in 1833, and has been the rule of Court since that time.<sup>4</sup> In a few cases, however, the rule was departed from, and the pursuer, instead of obtaining full expenses, had them modified.<sup>5</sup> In one case<sup>6</sup> a pursuer sued for £236 and defender tendered £150. The Court gave £145, with interest, which latter raised the sum awarded slightly above the amount tendered. Neither party got expenses. (2) If a pursuer gets the exact amount tendered or something less, he is entitled to expenses down to the date when the tender should have been accepted.<sup>7</sup> In one case,<sup>8</sup> the pursuer was refused his expenses down to the date of tender, and in another<sup>9</sup> Lord Pres. McNeill said that if the defender had not waived the point, he doubted whether the pursuer should have any expenses at all. It must be pointed out, however, that in the latter case an extrajudicial offer of a larger sum than the tender had been made. And, as the Lord President observed, it is open to the Court to exercise its discretion as to expenses irrespective of any question of tender. (3) If a pursuer recovers the exact amount of the tender or a less sum, the defender is entitled to his expenses from the date when the tender should have been accepted.<sup>10</sup> In a shipping case where two ships had come into

<sup>1</sup> *M'Clymont, supra*, overruling *Church, supra*.

<sup>2</sup> *Jack v. Black*, 1911 S.C. 691.

<sup>3</sup> *M'Laughlin v. Glasgow Tramway and Omnibus Co.*, 1897, 24 R. 992.

<sup>4</sup> *Heriot v. Thomson*, 1833, 12 S. 145.

<sup>5</sup> *Smith v. Baird*, 1843, 16 Sc. Jur. 133; *Wilkie v. Bethune*, 1848, 11 D. 132; *Webster v. Alexander*, 1859, 21 D. 1214.

<sup>6</sup> *Cutlar v. M'Leod's Trs.*, 1876, 13 S.L.R. 308.

<sup>7</sup> *Shaw v. Edinburgh and Glasgow Rly. Co.*, 1863, 2 M. 142; *John Hamilton & Co. v. Fleming & Co. (O.H.)*, 1918, 1 S.L.T. 229; *Brodie v. M'Gregor*, 1901, 4 F. 93.

<sup>8</sup> *Mackarsie v. Dickson*, 1848, 11 D. 164.

<sup>9</sup> *Aitchison v. Steven*, 1864, 3 M. 81.

<sup>10</sup> *Anderson v. Marshall*, 1835, 14 S. 54; *Strachan v. Monro*, 1845, 7 D. 993; *Imrie v. M'Whunnell*, 1847, 9 D. 522; *Shaw v. Edinburgh and Glasgow Rly. Co.*, 1863, 2 M. 142; *Henry Thomson & Co. v. Dailly (O.H.)*, 1896, 4 S.L.T. 172; *Mitchells v. Nicol*, 1890, 17 R. 795; *Sproll v. Walker*, 1899, 2 F. 73.



collision, one of the parties offered to settle on the basis that both ships were at fault, and such being the judgment of the Court, the party making the offer was held to be entitled to expenses from the date of the offer to settle, on the ground that such an offer was equivalent to a tender.<sup>1</sup> From this rule there have been one or two exceptions, where, although the pursuer recovered less than the amount of tender, neither party was found entitled to expenses after the date of tender, owing presumably to the fact that the pursuer's character was to some extent at stake in both cases.<sup>2</sup> This reason for departing from the usual rule was, however, discussed in a later case<sup>3</sup> and disregarded, the Court adhering to the established usage. In actions brought at common law and under the Employers' Liability Act, where the employer tenders the maximum payable under the Workmen's Compensation Act and is successful in the issue, the pursuer is liable in expenses.<sup>4</sup> (4) If a pursuer accepts a tender, the defender is entitled to his expenses from the date when the tender should have been accepted,<sup>5</sup> but only the expenses in the natural progress of the case.<sup>6</sup> Where a pursuer recovered less than the sum tendered, the Court in applying the verdict found the defenders entitled to expenses from the date of tender, and superseded extract of the decree for the sum recovered until the defenders should have obtained decree for their expenses.<sup>7</sup>

#### SUBSECTION (7).—*Extrajudicial Offer.*

**1239.** An extrajudicial offer made before litiscontestation may be, and often is, taken into consideration when awarding expenses in a subsequent litigation.<sup>8</sup> If the extrajudicial offer is repeated on record, and is larger than the sum recovered by the pursuer, the Court has given expenses against the pursuer, even though no expenses were tendered on record, in view of the reasonable attitude of the defender throughout.<sup>9</sup> If the extrajudicial offer is not repeated on record, and the amount recovered is less than the extrajudicial offer, the rule is

<sup>1</sup> *Hans Tobiasen v. Isle of Man Steam Packet Co., Ltd.* (O.H.), 1893, 1 S.L.T. 272; cf. *Owners of S.D. "Diligence" v. Owners of S.D. "Swift"* (O.H.), 1921, 2 S.L.T. 145.

<sup>2</sup> *Macfie v. M'William*, 1854, 26 Sc. Jur. 459; *Lawson v. Ferguson*, 1866, 38 Sc. Jur. 528.

<sup>3</sup> *Brodie v. MacGregor*, 1901, 4 F. 93.

<sup>4</sup> *Black v. Fife Coal Co., Ltd.*, 1909 S.C. 152 (reversed on the merits, 1912 S.C. (H.L.), 33).

<sup>5</sup> *A.B. v. Davidson*, 1836, 15 S. 306; *Gunn v. Hunter*, 1886, 13 R. 573; *M'Laughlin v. Glasgow Tramway and Omnibus Co.*, 1897, 24 R. 992; *Bryden v. Devlin*, (O.H.), 1899 6 S.L.T. 279.

<sup>6</sup> *Jacobs v. Provincial Motor Cab Co., Ltd.*, 1910 S.C. 756; but see *Jack v. Black*, 1911 S.C. 691.

<sup>7</sup> *Fry v. North-Eastern Rly. Co.*, 1882, 10 R. 290; *Bruce v. M'Lellan*, 1925 S.C. 103.

<sup>8</sup> *Ramsay's Trs. v. Souter*, 1864, 2 M. 891; *Little v. Burns*, 1881, 9 R. 118; *Maclaren*, pp. 80, 86.

<sup>9</sup> *Gunn v. Hunter*, *supra*; *Mavor & Coulson v. Grierson*, 1892, 19 R. 368.

that neither party is entitled to expenses,<sup>1</sup> but the soundness of the rule has been doubted.<sup>2</sup>

1240. An extrajudicial offer made after the action has been raised is on a different footing. In such a case there is no rule that the defender shall not be subjected in expenses. The whole circumstances of the parties as litigants must be looked at before a decision is made.<sup>3</sup> In *Wick v. Wick*,<sup>4</sup> an extrajudicial offer of £40 without expenses was made by the defender after the decision of the Sheriff granting absolvitor. The pursuer craved £51, 13s. 4d. The Inner House gave £36, 13s. 4d., and the pursuer was awarded expenses in the inferior Court, but he was only given one-half of his expenses in the Court of Session. In a recent case<sup>5</sup> a pursuer raised an action asking for £400 of damages. The defenders averred that the sum sued for was grossly excessive and that before the action was raised they had offered £30 in full settlement. The Sheriff-Substitute assoilzied the defenders but the Court recalled his interlocutor and awarded £25 to the pursuer with one-half of the expenses of the appeal and *quoad ultra* found no expenses due.

#### SUBSECTION (8).—*Arrestment and Inhibition.*

1241. Arrestments and inhibitions on the dependence do not secure the expense of using them, nor is the pursuer, if successful, entitled to obtain from the defender<sup>6</sup> the expense of using them; nor is the expense of arresting a ship on the dependence and dismantling her recoverable by the pursuer, at all events when the action is not one *in rem*;<sup>7</sup> nor are the expenses of arranging a bailbond for release of a ship recoverable from the other side.<sup>8</sup> The salvors of a vessel arrested the ship to enforce their maritime lien and were successful in an action for salvage. They were held entitled to recover the expenses of arrestment, it being observed by the Court that the proper remedy for the recovery of salvage is *in rem*.<sup>9</sup> Where arrestment and inhibition on the dependence and arrestment in execution were used in a consistorial action by a wife against her husband, the expense could not be included in the wife's account of expenses that the husband must pay.<sup>10</sup> An arrestment on the dependence covers interest on the debt sued for and the expenses of the action,<sup>11</sup> even though the decree for expenses is taken in the name of the agent.<sup>12</sup>

<sup>1</sup> *Gunn v. Hunter*, 1886, 13 R. 573; *Critchley v. Campbell*, 1884, 11 R. 475.

<sup>2</sup> *Miller v. M'Phun*, 1895, 22 R. 600.

<sup>3</sup> *Little v. Burns*, 1881, 9 R. 118.

<sup>4</sup> 1898, 1 F. 199.

<sup>5</sup> *Gore v. Leith Salvage and Towage Co.*, 1925, S.N. 12.

<sup>6</sup> *Maclaren*, p. 116; *Taylor v. Taylor*, 25th Jan. 1820, F.C.; *Symington v. Symington*, 1874, 1 R. 1006; *Roy v. Turner*, 1891, 18 R. 717.

<sup>7</sup> *Black v. Jehangeer Framjee & Co.*, 1887, 14 R. 678.

<sup>8</sup> *Ellerman's Wilson Line, Ltd. v. Commrs. of Northern Lighthouses*, 1921 S.C. 10.

<sup>9</sup> *Hatton v. Aktieselskabet Durban Hansen*, 1919 S.C. 154.

<sup>10</sup> *Symington v. Symington*, *supra*.

<sup>11</sup> *Wight v. Wight*, 1822, 1 S. 462; *Macdonald & Halket v. Wingate*, 1825, 3 S. 494.

<sup>12</sup> *May v. Malcolm*, 1825, 4 S. 76.

1242. If the arrestment or inhibition has been nimious or oppressive, a petitioner for recall will be entitled to expenses against the arrester or inhibitor.<sup>1</sup> If the defender is granted absolvitor or the action is dismissed, the expenses of clearing the record of an inhibition used on the dependence are payable by the inhibitor.<sup>2</sup> If the inhibition is warranted and only recalled on caution, the petitioner for recall must pay the expenses.<sup>3</sup> If the reason of the arrestment or inhibition has disappeared, the inhibitor or arrester is bound to withdraw it extrajudicially, otherwise he will be made liable in the expenses of the petition to recall;<sup>4</sup> not, however, where it is a petition for recall of arrestments used on the dependence where the defender has not been successful.<sup>5</sup> If the arrester refuses to withdraw the arrestment extrajudicially, and a petition for its recall is presented, the petitioner is not then bound to accept an extrajudicial recall.<sup>6</sup> In the case of *Symington v. Symington*,<sup>7</sup> when at a later date the husband petitioned for recall of the arrestments and inhibition, it was held that his wife, who unsuccessfully opposed the petition, was entitled to her expenses as between party and party. In a case where the pursuers used arrestments, the defenders, before lodging defences, moved the Lord Ordinary for recall. The Lord Ordinary refused the motion as incompetent. The pursuers were ultimately successful, and charged £6, 6s. as the expense of opposing the motion for recall. The auditor disallowed this item in respect that it had no reference to the case, but was connected with a separate process. The Court, however, sustained the pursuers' objection to the auditor's report to the extent of £3, 3s.<sup>8</sup> Where a defender, who had obtained judgment in his favour in the Outer House, used inhibition to secure his claim for expenses, and the Inner House reversed, the inhibition was recalled and the defender found liable in expenses of the petition.<sup>9</sup>

## SECTION 6.—PARTICULAR ACTIONS.

### SUBSECTION (1).—*Action of Constitution*.<sup>10</sup>

1243. An action of constitution is usually to be met with in conjunction with some other form of action. Expenses in actions of constitution are only asked for in the event of the claim being opposed,

<sup>1</sup> *Hamilton v. Bruce's Trs.*, 1857, 19 D. 745; *Cullen v. Buchanan*, 1862, 24 D. 1280; *Macintosh v. Miller*, 1864, 2 M. 452; *Radford & Bright, Ltd. v. D. M. Stevenson & Co.*, 1904, 6 F. 429.

<sup>2</sup> *Sheriff v. Balmer*, 1842, 4 D. 453; *Laing v. Muirhead*, 1868, 6 M. 282.

<sup>3</sup> *Burns v. Burns*, 1879, 7 R. 355.

<sup>4</sup> *Robertson v. Park, Dobson & Co.*, 1896, 24 R. 30; *Milne v. E. & J. Birrell*, 1902, 4 F. 879.

<sup>5</sup> *Roy v. Turner*, 1891, 18 R. 717; but see observations in *Robertson v. Park, Dobson & Co.*, *supra*.

<sup>6</sup> *Lickley*, 1871, 8 S.L.R. 624.

<sup>7</sup> *Symington v. Symington*, 1875, 3 R. 205.

<sup>8</sup> *Robert Muir & Co., Ltd. v. The United Collieries, Ltd.*, 1908 S.C. 768.

<sup>9</sup> *Jack v. M'Caig*, 1880, 7 R. 465.

<sup>10</sup> Maclaren, p. 261.



and a creditor in such an action is not entitled to expenses except in the event of the defender appearing and opposing the action.<sup>1</sup> If the action is opposed, expenses follow in the usual way.<sup>2</sup>

#### SUBSECTION (2).—*Action of Reduction.*<sup>3</sup>

1244. The summons in an action of reduction was, by Act of Sederunt, 20th March 1907,<sup>4</sup> made conform to an ordinary summons, and there are no peculiarities in the matter of expenses that call for notice.

#### SUBSECTION (3).—*Action of Proving of the Tenor.*<sup>5</sup>

1245. This action was placed on the same footing as ordinary actions by Act of Sederunt, 20th March 1907.<sup>6</sup> Expenses are not usually given against the defender<sup>7</sup> except where the latter has caused unnecessary expense. In one case expenses were not given against the defenders—the granter's representatives—where the defence was not unduly pressed, even though the special *casus amissionis* was that the granter had wrongfully abstracted the document from the grantee's repositories.<sup>8</sup>

#### SUBSECTION (4).—*Special Cases.*<sup>9</sup>

1246. By the Court of Session Act, 1868, s. 63, the Court is directed to dispose of all questions of expenses in special cases. Where the question at issue is the construction of testamentary deeds, it is usual to make the testator's estate pay for the ambiguities to which his deed has given rise;<sup>10</sup> not, however, where a unanimous judgment of the Division has been appealed to the House of Lords.<sup>11</sup> In one recent case, where the difficulties of construction were entirely due to the testator's own act, unsuccessful claimants obtained the expenses of an appeal to the House of Lords out of the trust estate.<sup>12</sup> In other cases, parties to a special case must be looked upon as ordinary litigants, and the successful parties, in the absence of special circumstances, are entitled to expenses as against the other parties.<sup>13</sup>

<sup>1</sup> *Earl of Rosslyn v. Lawson*, 1872, 9 S.L.R. 291.

<sup>2</sup> *Smith v. Kippen*, 1860, 22 D. 1495.

<sup>3</sup> Maclaren, p. 293.

<sup>4</sup> C.A.S., C, iv. 4 (a).

<sup>5</sup> Maclaren, p. 283.

<sup>6</sup> C.A.S., C, iv. 5.

<sup>7</sup> *Richmond v. Officers of State*, 1869, 7 M. 956.

<sup>8</sup> *Borland v. Andrew's Factor*, 1901, 4 F. 129; cf. *Browne v. Orr*, 1872, 10 M. 397.

<sup>9</sup> Maclaren, p. 297.

<sup>10</sup> *Wright's Trs. v. Wright*, 1870, 8 M. 708.

<sup>11</sup> *M'Culloch v. M'Culloch's Trs.*, 1903, 6 F. (H.L.) 3.

<sup>12</sup> *Wordie's Trs. v. Wordie*, 1916 S.C. (H.L.) 126.

<sup>13</sup> *Ogilvie's Trs. v. Miller*, 1870, 8 M. 427; *Halliday v. M'Callum*, 1870, 8 M. 112; *Logan's Trs. v. M'Lennan*, 1908, 45 S.L.R. 309, 15 S.L.T. 721; *Dundas' Trs. v. Dundas' Trs.*, 1912 S.C. 375

SUBSECTION (5).—*Multiplepinding*.<sup>1</sup>

**1247.** It is the invariable rule that when a multiplepinding is competently brought, the expenses of bringing the action fall to be paid out of the fund *in medio*.<sup>2</sup> If, however, the action is incompetent, the real raiser is liable to the nominal raiser and objector in expenses;<sup>3</sup> and where an action was held to be inept and inappropriate, trustees were held personally liable in expenses as real raisers.<sup>4</sup> In a case where the action was competent, and the real raisers were found entitled to expenses from the fund *in medio*, the claimants were found entitled to expenses from the real raisers in respect that the action was unnecessary.<sup>5</sup>

**1248.** If the claim is not opposed, it is treated as if it were an action of constitution, and the claimant is bound to pay his own expenses. If, however, it is opposed, the rule that expenses follow the event holds good, and the expenses, including the cost of lodging the claim, are payable by the unsuccessful claimant.<sup>6</sup> Consequently, where a claimant abandons his claim in terms of the statute, the expense of lodging the successful claim is part of the expenses which the party abandoning is required to pay.<sup>7</sup> So long as the fund *in medio* is in the hands of the Court, any person is entitled to lodge a claim. If the claimant has not been called as a defender, he may be allowed to lodge his claim without any condition as to expenses.<sup>8</sup> But where a person came forward alleging that he had not been called, and that there had been no advertisement, and that he was in the same position as two successful claimants, he was only allowed to lodge his claim upon payment to the two successful claimants of a proportion of the expenses to which they had been put.<sup>9</sup> If the person has been called as a defender, he is only allowed to lodge his claim upon payment of all expenses hitherto incurred which would not be available at the future stages of the cause.<sup>10</sup> In one case,<sup>11</sup> payment of these expenses was specially made a condition precedent. A person alleging that he was an interested party to the case, and had been in Australia and did not know of the proceedings, was allowed to lodge a claim without payment of expenses, in respect that his appearance caused no extra expense.<sup>12</sup> If a claimant stands aside until after the ranking, and then lodges a

<sup>1</sup> Maclaren, p. 285.

<sup>2</sup> *Hepburn's Trs. v. Rex*, 1894, 21 R. 1024.

<sup>3</sup> *Clark v. Campbell*, 1873, 1 R. 281; *Kyd v. Waterston*, 1880, 7 R. 884; *Robb's Trs. v. Robb*, 1880, 7 R. 1049; *Glass v. Robertson*, 1891, 1 F. 391.

<sup>4</sup> *Mackenzie's Trs. v. Sutherland*, 1894, 22 R. 233.

<sup>5</sup> *Hume's Trs. v. Ralston's Trs.*, 1834, 12 S. 727.

<sup>6</sup> *Buchanan v. Downie*, 1830, 8 S. 516; *The Clydesdale Bank, Ltd. v. Gardiner* (O.H.), 1906, 14 S.L.T. 236; see also *Rennie's Trs. v. Watt* (O.H.), 1904, 12 S.L.T. 414.

<sup>7</sup> *Agnew v. White* (O.H.), 1900, 8 S.L.T. 43.

<sup>8</sup> *Johnston v. Elder*, 1832, 10 S. 195.

<sup>9</sup> *National Bank v. Campbell*, 1901, 4 F. 17.

<sup>10</sup> *Jaffe v. Carruthers*, 1860, 22 D. 936; *Binnie's Trs. v. Henry's Trs.*, 1883, 10 R. 1075.

<sup>11</sup> *Dymond v. Scott*, 1877, 5 R. 196.

<sup>12</sup> *Sawer's Factor v. Sawyer*, 1889, 17 R. 1.

claim to be placed in the same position as a claimant who has fought and won his claim, the former will only be allowed to come in upon payment of the just proportion of the successful claimant's expenses.<sup>1</sup>

**1249.** In multiplepointings arising out of the construction of deeds it is common to allow the expenses of all claimants out of the fund *in medio*, if the difficulty has been caused by the ambiguity of the terms employed in the documents.<sup>2</sup> There is, however, no inflexible rule to that effect and in special circumstances expenses out of the fund have been refused.<sup>3</sup> Unsuccessful reclaimers have been allowed expenses in the Inner House.<sup>4</sup>

#### SUBSECTION (6).—*Divorce and Judicial Separation.*

##### (i) *Interim Award.*

##### (a) *Outer House.*

**1250.** Prior to the Married Women's (Scotland) Act, 1920,<sup>5</sup> the question of interim awards only arose in consequence of a claim by a wife. It has been held, however, that under s. 4 of the Act the Court may award interim aliment to a husband on a *prima facie* case of necessity being made out.<sup>6</sup> The case did not deal with the matter of expenses but there seems no reason why an interim award of expenses should not be made.

**1251.** The practice of granting awards for interim expenses rests on the necessity for instituting and completing without delay an inquiry into the facts, and it follows from this that the amount awarded is in practice restricted to bare necessities. But it is not the practice to limit or qualify the decrees otherwise than in amount, and there is no special appropriation to necessary outlays.<sup>7</sup> An agent is accordingly entitled to impute any balance to account of his business charges.<sup>8</sup> In actions of divorce raised by a husband against his wife, the latter is entitled to an award of interim aliment and expenses whenever the record is closed, provided that she has no separate estate.<sup>9</sup> The daily wages of a married woman is not separate estate.<sup>10</sup> An award is usually refused prior to the closing of the record.<sup>11</sup> In actions of divorce raised

<sup>1</sup> *Cowan's Trs. v. Cowan*, 1888, 16 R. 7.

<sup>2</sup> *Costine's Trs. v. Costine*, 1878, 5 R. 782; *Rennie's Trs. v. Watt* (O.H.), 1904, 12 S.L.T. 414; *Gibson's Trs. v. Wilson*, 1899, 1 F. 1016.

<sup>3</sup> *Moram v. Ford*, 1867, 5 M. 353; *Miller's Trs. v. Kirkaldy* (O.H.), 1905, 13 S.L.T. 474; *Bannerman's Trs. v. Bannerman*, 1915 S.C. 398.

<sup>4</sup> *Gibson's Trs. v. Wilson*, *supra*.

<sup>5</sup> 10 & 11 Geo. V. c. 64.

<sup>6</sup> *Adair v. Adair*, 1924 S.C. 798.

<sup>7</sup> Per Lord President Clyde in *Baird v. Clark*, 1922 S.C. 290.

<sup>8</sup> *Baird v. Clark*, *supra*.

<sup>9</sup> *Hoey v. Hoey*, 1883, 11 R. 25; *Milne v. Milne*, 1885, 13 R. 304; *Anderson v. Anderson*, 1896, 4 S.L.T. 36; *Burnett v. Burnett* (O.H.), 1896, 4 S.L.T. 120; *Robertson v. Robertson* (O.H.), 1905, 13 S.L.T. 114; *Junner v. Junner* (O.H.), 1908, 15 S.L.T. 732; *Jaffray v. Jaffray*, 1909 S.C. 577; *Brock v. Brock* (O.H.), 1922, S.L.T. 70.

<sup>10</sup> *Milne v. Milne*, *supra*.

<sup>11</sup> *M'Phedron v. M'Phedron* (O.H.), 1898, 6 S.L.T. 36.



by a wife against her husband the same rule holds good, even where the defender has a plea of "no jurisdiction."<sup>1</sup> In actions of separation and aliment, however, it is unusual to make an interim award until the Lord Ordinary is satisfied that a *prima facie* case has been made out.<sup>2</sup> In one case<sup>3</sup> of separation and aliment at the instance of a wife, the Lord Ordinary gave an interim award of £50, notwithstanding the fact that the pursuer had an income of £40 a year in her own right.

(b) *Inner House.*

**1252.** Where the husband, who was pursuer, reclaimed, the Court gave an interim award to the wife to enable her to present her case before the Inner House, but refused to increase this award so as to cover expenses incurred by her in the Outer House or to make payment of expenses a condition of proceeding with the reclaiming note.<sup>4</sup> In *Hoey v. Hoey*,<sup>5</sup> the aliment was continued on the wife reclaiming, and she was granted decree for the expenses in the Outer House; this case, however, is probably now of doubtful authority. But where, in an action of separation and aliment by a wife against her husband, the Lord Ordinary after a proof had assoilzied the defender, and the pursuer reclaimed and moved in the Inner House for an interim award, the motion was refused.<sup>6</sup>

(c) *House of Lords.*

**1253.** In a separation and aliment case at the instance of the wife, the husband appealed to the House of Lords, and the Court gave the wife an interim award of £100 towards her expenses.<sup>7</sup> The Court of Session and not the Appeal Committee is the proper tribunal to make an interim award.<sup>8</sup>

(ii) *Final Award.*

(a) *Outer House.*

**1254.** Where the husband is pursuer and successful, the wife is entitled to her expenses,<sup>9</sup> except where her defence is frivolous,<sup>10</sup> or where she has separate estate.<sup>11</sup> Where the husband was abroad, the payment

<sup>1</sup> *Pike v. Pike* (O.H.), 1899, 6 S.L.T. 331; *Linder v. Linder*, 1902, 4 F. 465.

<sup>2</sup> *Gunn v. Gunn* (O.H.), 1897, 5 S.L.T. 56; *Stuart Brown v. Stuart Brown* (O.H.), 1911, 2 S.L.T. 35.

<sup>3</sup> *M'Ewan v. M'Ewan* (O.H.), 1903, 11 S.L.T. 169.

<sup>4</sup> *Johnston v. Johnston*, 1903, 5 F. 336; *Jaffray v. Jaffray*, 1909 S.C. 577; *Anderson v. Anderson*, 1927 S.C. 561.

<sup>5</sup> 1883, 11 R. 25.

<sup>6</sup> *Bonnar v. Bonnar*, 1911 S.C. 854.

<sup>7</sup> *Symington v. Symington*, 1874, 1 R. 1006.

<sup>8</sup> *Cochrane v. Cochrane*, 1909 S.C. 333.

<sup>9</sup> *Milne v. Milne*, 1885, 13 R. 304; *Laing v. Laing* (O.H.), 1903, 11 S.L.T. 182.

<sup>10</sup> *Conacher v. Conacher* (O.H.), 1903, 11 S.L.T. 182.

<sup>11</sup> *Froebel v. Froebel* (O.H.), 1884, 22 S.L.R. 22; *Henderson v. Henderson*, 1888, 16 R. 84; *Robertson v. Robertson* (O.H.), 1908, 16 S.L.T. 641.

of the wife's expenses was made a condition precedent of decree.<sup>1</sup> But in a later case it was held that where a wife was divorced for adultery, payment by the husband of her expenses should not be made a condition precedent to decree.<sup>2</sup> Where the husband, who was pursuer, abandoned his case, the defender, though upon the poor's roll, was granted her expenses upon the ordinary scale.<sup>3</sup> Where the wife is pursuer in an action of divorce, and unsuccessful, she is entitled to expenses, except where she has separate estate.<sup>4</sup> Where the wife is pursuer in an action of separation and aliment the same rule holds. The Lord Ordinary, however, in the case of *Kirkhope v. Kirkhope*,<sup>5</sup> refused the pursuer—the wife—her expenses in respect of the failure of the pursuer's advisers to precognosce independent witnesses who would have shewn that the pursuer had no case to present to the Court. A wife has been awarded expenses even where a plea of "no jurisdiction," stated by the husband, has been sustained.<sup>6</sup> But in an undefended action where the wife failed to establish jurisdiction, expenses were refused.<sup>7</sup>

(b) *Inner House.*

**1255.** The general rule is that a wife is given her expenses in a reclaiming note, though unsuccessful, if the Court is of opinion that the matter in dispute ought to be reviewed;<sup>8</sup> but not where she has separate estate,<sup>9</sup> or where she has no probable ground of defence.<sup>10</sup>

(c) *House of Lords.*

**1256.** In an appeal by a wife against a decree of divorce without adequate grounds to justify her appeal, the House refused her expenses against her husband.<sup>11</sup>

(iii) *Scale of Taxation.*

**1257.** Expenses in consistorial causes are usually taxed as between agent and client.<sup>12</sup> It has been held that the provision in s. 7 of the Conjugal Rights Act, 1861, which authorises the Court in an action of divorce for adultery at the instance of the husband, to decern against the co-defender for the expenses of process and directs that "the same

<sup>1</sup> *Duff v. Duff* (O.H.), 1905, 13 S.L.T. 447.

<sup>2</sup> *M'Curdie v. M'Curdie* (O.H.), 1918, 2 S.L.T. 250.

<sup>3</sup> *Kelly v. Kelly* (O.H.), 1906, 14 S.L.T. 221.

<sup>4</sup> *Robertson v. Robertson* (O.H.), 1908, 16 S.L.T. 641; *Bennet Clark v. Bennet Clark*, 1909 S.C. 591.

<sup>5</sup> 1896, 4 S.L.T. 182.

<sup>6</sup> *Stavert v. Stavert*, 1882, 9 R. 519; *Linder v. Linder*, 1902, 4 F. 465.

<sup>7</sup> *Kelly v. Kelly*, 1928 S.C. 43.

<sup>8</sup> *Hoey v. Hoey*, 1884, 11 R. 905; *Thomson v. Thomson*, 1908 S.C. 179.

<sup>9</sup> *Bennet Clark v. Bennet Clark*, *supra* (full expenses given to husband).

<sup>10</sup> *Kirk v. Kirk*, 1875, 3 R. 128; *Dalgleish v. Dalgleish*, 1878, 5 R. 679; *Montgomery v. Montgomery*, 1881, 8 R. 403; *Hunt v. Hunt*, 1893, 31 S.L.R. 244.

<sup>11</sup> *Begg v. Begg*, 1890, 17 R. (H.L.) 60.

<sup>12</sup> *Taylor v. Taylor*, 1831, 10 S. 18; *King v. Patrick*, 1845, 7 D. 536; *Stair v. Stair* (O.H.), 1905, 13 S.L.T. 446; *Grant v. Grant*, 1905 (H.L.), 43 S.L.R. 109, 13 S.L.T. 516; *M'Caw v. M'Caw* (O.H.), 1907, 15 S.L.T. 392.

shall be taxed as between agent and client" is imperative and that an account of expenses so decerned for falls to be taxed as between agent and client without a direction to the auditor to that effect.<sup>1</sup> Matrimonial scale taxation proceeds upon the theory that the wife has no funds, and that expenses not recovered must be borne by the law agent himself.<sup>2</sup> So where a wife with separate estate was divorced and found liable to her husband in expenses it was held that the husband's account fell to be taxed as between party and party and not on the matrimonial scale.<sup>3</sup> On the other hand, where an action of separation and aliment by a wife against her husband was dismissed as irrelevant and the husband found entitled to expenses it was held that the account was to be taxed on the matrimonial scale. The husband was on the poor's roll and the wife had separate estate.<sup>4</sup> Where a pursuing husband was on the poor's roll and abandoned his case, the defender, who was also on the poor's roll, was held entitled to expenses only as between party and party, and her fee fund dues were remitted.<sup>5</sup> The Court has power to remit fee fund dues.<sup>6</sup>

(iv) *Co-defender.*

**1258.** A co-defender may be found liable in payment of the whole or part of the expenses of process, as between agent and client, provided he has been cited.<sup>7</sup> In the ordinary case the co-defender is liable in the whole expenses.<sup>8</sup> In one case<sup>9</sup> the co-defender and the defender, the latter of whom had separate estate, were found liable in the expenses of process conjunctly and severally. Generally speaking a co-defender is not found liable in expenses if he was unaware that the wife was a married woman.<sup>10</sup> When found liable in expenses, the co-defender will not be responsible for any expenses after the decree of divorce has been pronounced. He will not be responsible for the expense of subsequent proceedings involving the custody of the children.<sup>11</sup> If assoilzied, the co-defender will get his expenses, except where he has been guilty of suspicious or reprehensible conduct.<sup>12</sup>

SUBSECTION (7).—*Declarator of Marriage.*

**1259.** There is no case on record where an interim award of expenses has been correctly awarded in the Outer House to the female pursuer.

<sup>1</sup> *Fairgrieve v. Chalmers*, 1912 S.C. 745.

<sup>2</sup> *Ovenstone v. Ovenstone* (O.H.), 1922, S.L.T. 65.      <sup>3</sup> *A.B. v. C.D.*, 1918 S.C. 19.

<sup>4</sup> *Adair v. Adair* (O.H.), 1925, S.L.T. 286.

<sup>5</sup> *Kelly v. Kelly* (O.H.), 1906, 14 S.L.T. 221.

<sup>6</sup> C.A.S., K, ii. 5 (Act of Sederunt, 18th December 1896).

<sup>7</sup> Conjugal Rights Act, 1861, s. 7.

<sup>8</sup> *Munro v. Munro*, 1877, 4 R. 332; *Stair v. Stair* (O.H.), 1905, 13 S.L.T. 446.

<sup>9</sup> *Froebel v. Froebel* (O.H.), 1884, 22 S.L.R. 22.

<sup>10</sup> *Lawrie v. Lawrie* (O.H.), 1913, 1 S.L.T. 117; *Heggie v. Heggie* (O.H.), 1917, 2 S.L.T. 246.

<sup>11</sup> *Hamilton v. Hamilton*, 1896, 4 S.L.T. 183.

<sup>12</sup> *Edward v. Edward & Jenkinson*, 1879, 6 R. 1255; *Collins v. Collins & Eayres*, 1882, 10 R. 250.



In the case of *Campbell v. Sassen*<sup>1</sup> interim aliment was given, but it was disapproved of by the House of Lords, and in a subsequent case interim aliment was refused.<sup>2</sup> When, however, a woman has obtained a judgment in her favour, the Court has granted her an interim award of expenses in order to maintain the judgment.<sup>3</sup> In one case, the Court, though the Lord Ordinary had given decree of declarator, refused an interim award in respect that an additional proof was necessary, and that the pursuer had treated her children by the defender as illegitimate.<sup>4</sup>

#### SUBSECTION (8).—*Declarator of Nullity of Marriage.*

**1260.** Where the action is at the instance of the wife, her attitude towards the marriage might be expected to preclude her from an interim award of expenses, but in a recent case an interim award of both aliment and expenses was given.<sup>5</sup> If she is ultimately successful, the usual rule that expenses follow the event will apply; if unsuccessful, the rule in consistorial causes will hold good. If the action is at the instance of the husband, the wife may reasonably be entitled to an interim award in the Outer House, as there is a presumption in favour of the marriage until annulled. Doubts, however, have been expressed upon this point.<sup>6</sup> Where the Lord Ordinary has annulled the marriage, and the wife has reclaimed, an interim award of expenses to prosecute the reclaiming note will not be granted. In an action of declarator of nullity of marriage brought by a husband against his wife, the defender was assoilzied and found entitled to expenses. Thereafter the Lord Ordinary held that the expenses fell to be taxed on the intermediate scale, which it was the Auditor's practice to apply to a wife's account in actions of divorce at the instance of her husband.<sup>7</sup>

#### SUBSECTION (9).—*Aliment.*

**1261.** In an action for aliment by a wife against her husband, it is competent to give an interim award to account of expenses *in initio litis*.<sup>8</sup> In an action in which the wife averred that her husband had refused to support her or to allow her to live with him, an award of interim expenses was awarded, although the husband offered in his defences to receive her.<sup>9</sup>

#### SUBSECTION (10).—*Custody of Children.*

**1262.** The expenses in these proceedings are a matter of circumstance. In the case of *Bloe v. Bloe*,<sup>10</sup> though the husband was successful in his

<sup>1</sup> *Campbell v. Sassen*, 1826, 2 W. & S. 309.

<sup>2</sup> *Brown v. Burns*, 1843, 5 D. 1288; *Murison v. Murison*, 1923 S.C. 40.

<sup>3</sup> *Forster v. Forster*, 1869, 7 M. 546; *Petrie v. Petrie*, 1910 S.C. 136.

<sup>4</sup> *Fleming v. Corbet*, 1858, 21 D. 179.

<sup>5</sup> *A.D. v. W.D.*, 1909, 1 S.L.T. 342.

<sup>6</sup> *Ballantyne v. Ballantyne*, 1865, 4 M. 494.

<sup>7</sup> *R. v. R. (O.H.)*, 1923, S.L.T. 45.

<sup>8</sup> *Tibbetts v. Tibbetts*, 1862, 24 D. 599.

<sup>9</sup> *Crombie v. Crombie*, 1868, 6 M. 776.

<sup>10</sup> 1882, 9 R. 894.

petition, he was found liable in expenses to his wife, who opposed and pleaded that the petition was premature. In *Burnett v. Burnett*<sup>1</sup> an action of divorce at the instance of the husband, the wife, while admitting adultery, pleaded that the pursuer was not a proper guardian for the children, and she was granted an interim award of expenses to support her allegations. In *Mackellar v. Mackellar*,<sup>2</sup> a wife living apart from her husband presented a petition and was unsuccessful, and was awarded partial expenses as she had private means. The account was taxed as between party and party. In *Boyd v. Boyd*,<sup>3</sup> the wife, though unsuccessful in her petition, obtained an award of partial expenses. In the case of *Beattie v. Beattie*,<sup>4</sup> where the husband was the petitioner, and the wife asked for a sist pending the result of an action of separation and aliment, the motion was refused, as were also expenses. Expenses were also refused to the wife in the case of *Lang v. Lang*.<sup>5</sup> In a recent case<sup>6</sup> where a wife possessing separate estate put forward an obstructive and unsuccessful defence, the husband was found entitled to expenses. Where a wife against whom a decree of divorce had been pronounced on the ground of desertion presented a petition for access to the minor children, and while the petition was still pending, the Court recalled the decree of divorce on a reclaiming note. Thereafter they dismissed the petition but allowed the wife her expenses in presenting it.<sup>7</sup>

#### SUBSECTION (11).—*Adjudications.*

**1263.** In adjudications for debt there is no conclusion for expenses, this adjudication being a diligence. Where the defender, however, causes unnecessary opposition, he may be found liable in expenses. These must be kept separate from the decree of adjudication, and the agent must take and extract a separate decree in his own name.<sup>8</sup> Where expenses have been given in a separate action of constitution, such expenses may be included in the sum for which the adjudication is led. If there is a penalty stipulated for, expenses should not also be asked, as the expenses will be recovered out of the penalty,<sup>9</sup> and this though the penalty has been restricted to necessary expenses.<sup>10</sup>

**1264.** In adjudication in implement, which is not a diligence, the summons should always contain a conclusion for expenses against the defender in the event of his appearing and causing expense, and the expenses of a decree of constitution may be included in the sum adjudged for.<sup>11</sup>

<sup>1</sup> (O.H.), 1896, 4 S.L.T. 120.

<sup>3</sup> 1902, 4 F. 506.

<sup>4</sup> 1883, 11 R. 85.

<sup>2</sup> 1898, 25 R. 883.

<sup>5</sup> 1869, 7 M. 445.

<sup>6</sup> *Campbell v. Campbell*, 1920 S.C. 31, following *Mackellar v. Mackellar*, *supra*.

<sup>7</sup> *Barkworth v. Barkworth*, 1913 S.C. 759.

<sup>8</sup> Mackay, Manual, p. 655; Graham Stewart, Diligence, p. 589; Maclaren, Expenses, p. 109.

<sup>9</sup> *Auchinbreck's Crs.*, 1769, Mor. 268; Hailes, p. 271; Shand, Practice, p. 670.

<sup>10</sup> *Davidson v. M'Kenzie*, 1774, 5 Bro. Supp. 437.

<sup>11</sup> Graham Stewart, Diligence, p. 669; Mackay, Manual, p. 655; Beveridge, Forms, p. 492; Maclaren, Expenses, p. 110.

SUBSECTION (12).—*Furthcoming.*

**1265.** As the expenses of the action are not secured by the arrestment, there should be a conclusion against the common debtor personally for them.<sup>1</sup> The creditor is, in addition, entitled to the expense of an arrestment in execution. The arrestment, it is thought, does not secure this, and accordingly the summons should have a conclusion to that effect against the common debtor.<sup>2</sup> The summons should also conclude for expenses against the arrestee in the event of his appearing and opposing.<sup>3</sup>

SUBSECTION (13).—*Sequestration for Rent.*

**1266.** If the sequestration is for payment the landlord is entitled to the expense of the diligence.<sup>4</sup> Even in competition with preferential claims, the expenses of sequestration are a first charge on the sum recovered.<sup>5</sup> Where the sequestration is in security, the landlord must bear the expense, if the rent is duly paid.<sup>6</sup>

SUBSECTION (14).—*Suspension, Suspension and Interdict, and Liberation.*

**1267.** Prior to the Act of Sederunt, 20th March 1907, the only case in which the Lord Ordinary on the Bills could award expenses was when the note was refused or dismissed, or on a certificate of no caution or non-compliance. By this Act of Sederunt,<sup>7</sup> however, it is now competent for the Lord Ordinary on the Bills to award expenses, and to decide all questions relating thereto in processes of suspension, interdict, suspension and interdict, or suspension and liberation depending in the Bill Chamber, to the same effect as if such actions had been transmitted to the Court of Session. Where no appearance has been entered, and no answers lodged in either of these processes, and the note has been passed, it is in the power of the Lord Ordinary on the Bills to pronounce a final interlocutor and to award expenses against the respondent, and to decern for the taxed amount thereof in the same manner as if the case had been transmitted to an Outer House judge. In an action of interdict against a sheriff officer as an agent, expenses cannot be recovered unless the sheriff officer has shewn an intention of doing an illegal diligence.<sup>8</sup> In an action for interdict of a nuisance,

<sup>1</sup> *May v. Malcolm*, 1825, 4 S. 76 at 79; *Innes v. Forbes*, 1740, Mor. 691; Bell, Com. ii. 73; Maclaren, iii.

<sup>2</sup> Darling, Practice, p. 345; Maclaren, p. 111.

<sup>3</sup> *Wightman v. Wilson*, 1858, 20 D. 779.

<sup>4</sup> *Galloway v. M'Pherson*, 1830, 8 S. 539; *Clark v. Duncan*, 1833, 12 S. 158; *Renfrew v. Hall*, 1901, 4 F. (J.) 27; *Stalker v. Somerville*, 1901, 4 F. (J.) 31.

<sup>5</sup> *Drysdale v. Kennedy*, 1835, 14 S. 159.

<sup>6</sup> *Gordon v. Suttie*, 1836, 14 S. 954; see also *Oswald v. Graeme*, 1851, 13 D. 1229; *Shaw v. Browne*, 1885, 1 S.L.R. 341; *Douglas v. Fraser*, 1887, 3 S.L.R. 344; Maclaren, p. 114.

<sup>7</sup> C.A.S., E, ii, 23, 25.

<sup>8</sup> *Wyllie v. Fisher*, 1907 S.C. 686.



the defenders were allowed an opportunity of executing certain remedial measures. The pursuer maintained that these measures were ineffective, and a remit was made to a man of skill who reported that the nuisance had been effectively removed. In dismissing the petition for interdict, the Court allowed the defenders the expenses of the remit.<sup>1</sup>

### SUBSECTION (15).—*Petitions.*

#### (i) *Entail Petitions.*

**1268.** In petitions under the Entail Acts it is competent to decern for expenses of process against any of the parties to the proceedings, or to decern for payment thereof out of the entailed estate concerned, or out of the money consigned under the application.<sup>2</sup> In petitions for borrowing money for improvement expenditure the Court may grant the expenses of process out of the consigned money.<sup>3</sup> Where the estate is charged by bond and disposition in security with only a portion of the expenditure, the charger is only entitled to include in the bond the same proportion of the actual or estimated expenses of the application.<sup>4</sup> Where the application, however, is to substitute a bond and disposition in security for the amount of the unpaid portion of a rent-charge created over the entailed estate, no expenses are given.<sup>5</sup> In petitions for authority to sell a portion of an entailed estate for the purpose of paying off debt, the expenses are payable out of the price.<sup>6</sup> In petitions for an order for sale under 45 & 46 Vict. c. 53, the expenses incurred in the application may be deducted from the price.<sup>7</sup> Where an heir of entail craved authority to uplift a consigned sum, which represented the compensation awarded by the Land Court in respect of the constitution of small holdings on the entailed estate, and the Board of Agriculture unsuccessfully resisted the petition, expenses were allowed out of the consigned fund and not against the Board.<sup>8</sup>

**1269.** In petitions to uplift money consigned and to apply to expenditure on improvements (1) where the heir of entail consigned the money derived from the discharge of casualties, the expenses of a petition to uplift and apply were allowed out of the consigned fund;<sup>9</sup> (2) where the money is consigned in terms of the Lands Clauses Act, 1845,<sup>10</sup> the practice has varied: (a) the expenses of a petition to uplift and apply have been divided equally between a railway company

<sup>1</sup> *M'Ewan v. Steedman & M'Alister*, 1913 S.C. 761.

<sup>2</sup> 38 & 39 Vict. c. 61, s. 12 (6).

<sup>3</sup> *Ibid.*, s. 7; 41 & 42 Vict. c. 28, s. 3.

<sup>4</sup> *Leith v. Leith*, 1888, 15 R. 944; *Gillon Fergusson v. Gillon Fergusson*, 1886, 24 S.L.R. 113.

<sup>5</sup> *Stewart, Petr.*, 1886, 13 R. 568.

<sup>6</sup> 11 & 12 Vict. c. 36, s. 25; Duncan, *Entail Procedure*, p. 189.

<sup>7</sup> Sec. 23 (9); *Baird, Petr.* (O.H.), 1921, 2 S.L.T. 230.

<sup>8</sup> *Ross, Petr.* (O.H.), 1926, S.L.T. 105.

<sup>9</sup> *Campbell*, 1901, 8 S.L.T. 361.

<sup>10</sup> Para. 1271, *infra*.

and the petitioner;<sup>1</sup> (b) a railway company has been made to pay all expenses;<sup>2</sup> and (c) a railway company has been found liable to pay all the expenses of the petitioner, except the expense of advertisement and service on the next heirs.<sup>3</sup> A railway company has been held liable for the expenses of a second investment of the sum consigned,<sup>4</sup> and also for the expenses of disburdening the lands compulsorily acquired by deeds of restriction.<sup>5</sup>

**1270.** The expenses of other petitions under the Entail Acts have been usually made a matter of arrangement between the parties. A *curator ad litem* appointed to a minor in a petition for disentail is entitled to recover from the petitioner the expenses of his appointment and necessary expenses.<sup>6</sup> Where an incidental note was necessary on behalf of the executor of one of the heirs in possession, the expenses thereof were diverted to form part of the expenses of a pending petition.<sup>7</sup> And where marriage-contract trustees compeared as respondents in a petition to sell an entailed estate they were allowed expenses from the proceeds of the sale.<sup>8</sup> The right to disentail being a privilege, if the next heirs in succession raise questions in the petition which are not unreasonable, they will not be found liable in expenses.<sup>9</sup>

(ii) *Under the Lands Clauses Acts.*

**1271.** By s. 80 of the Lands Clauses Act, 1845, the promoters of the undertaking are liable in the expenses of obtaining from the Court the proper orders for the following matters: the purchase or taking of lands; the investment of moneys consigned in Government or real securities; the reinvestment thereof in the purchase of other lands; re-entailing any of such lands; the payment of dividends and interest of the securities upon which such moneys are invested; and the payment of the principal of such moneys or of the securities whereon the same are invested. The expense of one application only for reinvestment in land is allowed, unless it appears to the Court that it is for the benefit of the parties interested in the said moneys that the same should be invested in the purchase of lands in different sums and at different times, in which case the Court may order the expenses of such investments to be paid by the promoters of the undertaking. In *Grant v. Edinburgh*,

<sup>1</sup> *Drummond Hay v. North British Rly. Co.* (O.H.), 1873, 1 R. 180; *Forbes v. Caledonian Rly. Co.* (O.H.), 1886, 24 S.L.R. 212.

<sup>2</sup> *Stair, Petr.* (O.H.), 1882, 19 S.L.R. 618; *Stirling Stuart, Petr.*, 1900, 8 S.L.T. 53; *Maitland, Petr.* (O.H.), 1882, 20 S.L.R. 35; *Hamilton, Petr.* (O.H.), 1903, 40 S.L.R. 872, 11 S.L.T. 64; *Macdowall, Petr.* (O.H.), 1916, 2 S.L.T. 170.

<sup>3</sup> *Willoughby de Eresby v. Callander and Oban Rly. Co.*, 1885, 13 R. 70; *Carrick Buchanan v. North British Rly. Co.* (O.H.), 1905, 12 S.L.T. 764; *Blythswood v. Glasgow and South-Western Rly. Co.*, 1914 S.C. 726.

<sup>4</sup> *Crawford v. Caledonian Rly. Co.* (O.H.), 1904, 42 S.L.R. 13, 12 S.L.T. 292.

<sup>5</sup> *Saltoun v. Great North of Scotland Rly. Co.* (O.H.), 1906, 14 S.L.T. 370.

<sup>6</sup> *Johnstone, Petr.*, 1884, 12 R. 468.

<sup>7</sup> *Bedell-Sivright's Curator Bonis*, (O.H.), 1924 S.L.T. 17.

<sup>8</sup> *Hope Vere, Petr.* (O.H.), 1921, 2 S.L.T. 271.

<sup>9</sup> *M'Donald v. M'Donalds*, 1879, 6 R. 1011; *Pringle v. Pringle*, 1892, 19 R. 926.

*Perth and Dundee Rly. Co.*,<sup>1</sup> there were circumstances in which it was held that a railway company were liable for the expenses of a second application to the Court to reinvest the consigned money. But where money has been temporarily invested in the names of two trustees and one dies the purchaser is not liable for the expenses of a note appointing a new trustee.<sup>2</sup> Where estates disposed in favour of successive liferenters were held by trustees partly in the form of investments derived from compensation money, and the trustees presented a note for authority to apply part of the trust funds in payment of estate duty, expenses out of the trust funds were refused on the ground that there was no statutory authority therefor.<sup>3</sup>

1272. The expenses of remits for reports appropriate to entail petitions fall on the purchaser.<sup>4</sup> By s. 83, if the expenses of conveyances cannot be agreed upon, a summary petition to the Lord Ordinary may be presented, and the promoters are liable in the expenses of taxation and of the petition, unless one-sixth or more has been taxed off, in which case the expenses are borne by the party whose expenses have been taxed. By the Acquisition of Land (Assessment of Compensation) Act, 1919, special provisions are made as to expenses in cases where questions of compensation come before the official arbitrator. See COMPULSORY PURCHASE. The expenses of petitions must be prayed for.<sup>5</sup>

### (iii) *Under the Merchant Shipping Acts.*

1273. The expenses of petitions for limitation of liability under ss. 503 and 504 of the Merchant Shipping Act, 1894, are paid by the petitioners. Where the owners of a ship brought such a petition in respect of loss caused by a collision, in which both ships were found to be in fault, it was held that the owners of the other ship and its cargo were entitled to the expenses of their respective claims and relative procedure against the petitioners, and that the fact that both ships were to blame did not affect the matter.<sup>6</sup> "Where no question is raised as to the right of petitioners to have their liability limited, and where the ship, as it were, tables its stakes, then such expenses as are given against the petitioners over and above the limited fund must be strictly restricted to the expenses of lodging the claims and taking decree, and not extended to any expenses incurred in the competition between the claimants."<sup>7</sup> Where a respondent failed in his opposition to a petition, he was held liable in expenses in so far as caused by his

<sup>1</sup> 1851, 13 D. 1015; *Crawfurd v. Caledonian Rly. Co.* (O.H.), 1904, 42 S.L.R. 13, 12 S.L.T. 292.

<sup>2</sup> *Earl of Morton v. Mags. of Edinburgh* (O.H.), 1917, 1 S.L.T. 18.

<sup>3</sup> *Chaplin, Petr.* (O.H.), 1926, S.L.T. 422.

<sup>4</sup> Sec. 79; *Blythswood v. Glasgow and South-Western Rly. Co.*, 1914 S.C. 726.

<sup>5</sup> Duncan, Entail Procedure, p. 141.

<sup>6</sup> *Owners of the "Olga" v. Owners of the "Anglia"*, 1907 S.C. 1045.

<sup>7</sup> Per Lord Pres. Dunedin in *Kennedys v. Clyde Shipping Co., Ltd.*, 1908 S.C. 895.



contention that the petitioner was not entitled to proceed under the petition.<sup>1</sup>

(iv) *Relative to Appeals to the House of Lords.*

(a) *For Leave to Appeal.*

**1274.** There is no crave for expenses in this petition, and the expenses usually remain expenses in the cause. In a case where leave to appeal was refused, and the party refused was ultimately successful in the House of Lords, the successful appellant's expenses opposing the petition for leave were not allowed, in respect that the petition was held to be a separate application in which the successful appellant to the House of Lords had not been successful.<sup>2</sup> A decree was pronounced in a reclaiming note and leave to appeal was granted; the appeal was thereafter dropped, and it was held that the expenses incurred by the respondent in respect of the appeal could not be dealt with by the Court of Session.<sup>3</sup>

(b) *For Interim Execution or Regulation pending Appeal.*

**1275.** Where decree has been granted for an ascertained sum, with expenses, the successful party is entitled to have interim execution of the judgment pending an appeal to the House of Lords.<sup>4</sup> Interim execution for expenses is sometimes granted where it is otherwise refused.<sup>5</sup> Where interim execution is granted for expenses, it is usual to grant it subject to caution for repetition in the event of a reversal of the judgment by the House of Lords.<sup>6</sup> Caution was dispensed with in a case where a husband appealed from a judgment in his wife's favour.<sup>7</sup> In the case of the *Ballachulish Slate Quarries Co., Ltd. v. Grant*,<sup>8</sup> the Court allowed interim execution for expenses, but superseded extract for two months in order that the parties might have an opportunity to settle. Where a pursuer was successful and was awarded expenses, reserving consideration as to their modification until the Auditor's report was presented, and an appeal was taken to the House of Lords before the approval of the Auditor's report, the Court refused the petition for interim execution for expenses in respect that after an appeal was presented it was incompetent to deal with the question of modification.<sup>9</sup> An interim award of the expenses of this petition is not made.<sup>10</sup> If the appellant to the House of Lords opposes a petition

<sup>1</sup> *Couper v. Mackenzie*, 1906, 8 F. 1202.

<sup>2</sup> *Bell v. Kennedy*, 1868, 7 M. 49.

<sup>3</sup> *Mackendrick v. National Union of Dock Labourers*, 1911 S.C. 536.

<sup>4</sup> *M'Beath v. Forsythe*, 1887, 15 R. 8.

<sup>5</sup> *Brock v. Cabbell*, 1823, 2 S. 291.

<sup>6</sup> *Cochrane v. Bogle*, 1849, 12 D. 302; *Steel Co. of Scotland v. Tancred, Arrol & Co.*, 1889, 26 S.L.R. 465.

<sup>7</sup> *A.B. v. C.B.*, 1884, 11 R. 1060.

<sup>8</sup> 1903, 5 F. 1105.

<sup>9</sup> *Williamson v. Macpherson & Co.*, 1904, 7 F. 231.

<sup>10</sup> *King, Brown & Co. v. Anglo-American Brush Electric Light Corporation, Ltd.*, 1891, 7 F. 231.

for interim execution, and is unsuccessful, but is successful in his appeal, he is not entitled to the expenses of opposing the petition unless the expenses are expressly given by the House of Lords.<sup>1</sup> The expenses of a petition for interim execution may be awarded though the judgment on the merits is reversed by the House of Lords.<sup>2</sup> In one case the Court, where an appeal had been lodged but before the order for service had been made, approved of the Auditor's report, and granted decree for expenses, subject to repetition in the event of the reversal of their judgment.<sup>3</sup>

(c) *To Apply Judgment.*

**1276.** As a rule the expenses of a petition to apply the judgment of the House of Lords are allowed if the appeal has been sustained,<sup>4</sup> but refused if it has been dismissed,<sup>5</sup> and the petition therefore unnecessary. Whether or not a petition by the successful party to apply the judgment of the House of Lords is necessary is a question of the circumstances of the particular case,<sup>6</sup> but in one case the successful party was refused the expenses of a petition on the ground that it was of no practical use.<sup>7</sup> Where no expenses are given in the House of Lords to either party, the petition to apply the judgment falls under the same rule, and no expenses are awarded.<sup>8</sup> Where an appeal is sustained and more than applying the judgment is asked for in the petition and refused, the expenses of the petition are not allowed.<sup>9</sup> Where the appeal is successful, the petition to apply judgment should ask for repetition, whether there has been caution or not.<sup>10</sup> The successful appellant is not, however, entitled to interest on the amount paid by him in name of expenses, unless the House of Lords orders it,<sup>11</sup> or the bond of caution says so.<sup>12</sup> Where the respondent is successful, it is competent for the Court of Session to consider the question of interest.<sup>13</sup> Where a judgment of the House of Lords exhausting a case is silent as to expenses, it is incompetent for the Court to award them.<sup>14</sup> Where the House of Lords has pronounced a judgment exhausting a cause and ordering the expenses paid by the appellants to the respondent to be repaid, but without a finding for expenses prior to the appeal, the Court will not dispose of the

<sup>1</sup> *Fleeming v. Howden*, 1868, 7 M. 79.

<sup>2</sup> *Symington v. Symington*, 1877, 4 R. 993.

<sup>3</sup> *North British Rly. Co. v. The Budhill Coal and Sandstone Co.*, 1909 S.C. 504.

<sup>4</sup> *Duke of Hamilton v. Barns Graham*, 1872, 9 S.L.R. 304; *Watt v. Ligertwood*, 1874, 1 R. 1122.

<sup>5</sup> *Peters v. Mags. of Greenock*, 1893, 20 R. 924.

<sup>6</sup> *Walker v. Whitwell*, 1916 S.C. 759.

<sup>7</sup> *Reid's Trs. v. Dawson*, 1915 S.C. 844.

<sup>8</sup> *Teacher's Trs. v. Calder*, 1900, 2 F. 372.

<sup>9</sup> *Fleeming v. Howden*, *supra*; *Roger v. Cochrane & Co.*, 1910 S.C. 1.

<sup>10</sup> *Mags. of Montrose v. Mill*, 1825, 4 S. 180.

<sup>11</sup> *Ewart v. Latta*, 1865, 3 M. 1167; *Fleeming v. Howden*, *supra*; *Young v. Hermand Oil Co., Ltd.*, 1892, 19 R. 867; *Roger v. Cochrane & Co.*, *supra*.

<sup>12</sup> *Fleeming v. Howden*, *supra*.

<sup>13</sup> 48 Geo. III. c. 151, s. 20.

<sup>14</sup> *North British Rly. Co. v. Tod*, 1847, 9 D. 1459.

question of expenses.<sup>1</sup> Something appears to turn on the circumstances of each case and on the terms of the House of Lords judgment. So, where the House of Lords reversed an interlocutor of the Inner House recalling an interlocutor of the Lord Ordinary, without any affirmance of the latter and without any finding as to expenses, and a remit was made to the Court of Session "to proceed further therein as is consistent with this judgment and as is just," it was held competent for the Court to deal with expenses.<sup>2</sup>

(v) *For Appointment, Recall of Factors, etc.*

(a) *Appointment.*

**1277.** In petitions for the appointment of guardians, judicial factors, etc., expenses usually follow the result.<sup>3</sup> If the petition is unopposed and is granted, the expenses come out of the estate. This rule applies even to the case where a petition for appointment of a *curator bonis* was made in the Court of Session on an estate of less than £100 annual value, it being necessary to obtain power to sell the ward's heritable estate. The Court granted expenses on the Court of Session scale.<sup>4</sup>

**1278.** If the petition is opposed successfully, the party opposing is entitled to his expenses from the petitioner.<sup>5</sup> If the petition is opposed and the opposition is unsuccessful, the party opposing is found liable in expenses so far as arising from his opposition.<sup>6</sup> Such expenses are sometimes modified.<sup>7</sup> In a petition for the appointment of a *curator bonis* to an *incapax*, where the wife of the alleged *incapax* lodged answers and successfully reclaimed against an interlocutor by the Lord Ordinary making an appointment without inquiry, the Court granted the wife her expenses from the date of the Lord Ordinary's interlocutor.<sup>8</sup> Where a law agent unjustifiably opposed in the name of an *incapax* a petition to have a *curator bonis* appointed, and was unsuccessful, he was found liable in expenses.<sup>9</sup> Where the opposition to such a petition, though unsuccessful, was not unjustifiable, the law agents of the *incapax* have been given their expenses out of the estate of the *incapax*.<sup>10</sup>

**1279.** If the respondent successfully opposes the nominee of the petitioner for the position of factor, the expenses of the respondent

<sup>1</sup> *Stewart v. Scot*, 1836, 14 S. 692; *Forbes v. Ministers of Old Machar*, 1871, 8 S.L.R. 341.

<sup>2</sup> *Sawers' Exrs. v. Sawers' Trs.*, 1873, 11 M. 451; cf. *Colquhoun v. Burrows*, 1854, 17 D. 245.

<sup>3</sup> *Macqueen, Petr.*, 1910, 2 S.L.T. 445.

<sup>4</sup> *Fleming, Petr. (O.H.)*, 1911, 48 S.L.R. 8.

<sup>5</sup> *Collins v. Young*, 1853, 1 Macq. 385; *Glasgow, Garnkirk and Coatbridge Rly. Co. v. Caledonian Rly. Co.*, 1850, 12 D. 944; *Baird v. Caledonian Rly. Co.*, 1851, 13 D. 795.

<sup>6</sup> *Primrose v. Caledonian Rly. Co.*, 1851, 13 D. 1214; *Stewart v. Morrison*, 1892, 19 R. 1009.

<sup>7</sup> *Wishaw and Coltness Rly. Co. v. Caledonian Rly. Co.*, 1851, 13 D. 464.

<sup>8</sup> *Alston v. Alston*, 1895, 23 R. 16.

<sup>9</sup> *McCall v. Sharp and Bayne*, 1862, 24 D. 393.

<sup>10</sup> *Macfarlane v. Macfarlane*, 1847, 10 D. 38; *Mitchell & Baxter v. Cheyne*, 1891, 19 R. 324.



have been given out of the estate.<sup>1</sup> Where the respondent suggests a different nominee from that of the petitioner and both are rejected and a neutral person appointed, the expenses of both parties have sometimes been allowed out of the estate<sup>2</sup> and sometimes refused.<sup>3</sup> When one of the parties ultimately suggested the name of a person acceptable to the Court, the expenses of such party were allowed out of the estate.<sup>4</sup>

**1280.** Where there are two petitions and one is unsuccessful, the expenses of the latter will not be allowed out of the estate.<sup>5</sup>

(b) *Recall, Exoneration, etc.*

**1281.** As a general rule the expenses of a petition for recall are borne by the estate. But where a *curator bonis* on a small estate, fifteen months after his appointment, petitioned for discharge and the appointment of a new *curator* on the ground that he had obtained an appointment abroad, the Court held that the expenses of the petition were not a proper charge on the estate.<sup>6</sup> If there has been misconduct on the part of a judicial factor, he will be found liable in the expenses of a petition for his recall.<sup>7</sup> In petitions for exoneration and discharge, a prayer is inserted in the petition to find the expenses a proper charge against the estate. The expenses of such a petition, when properly brought, are always allowed in the audit of the petitioner's accounts.<sup>8</sup>

(vi) *For Special Powers.*

**1282.** The expense of such petitions is a matter entirely in the discretion of the Court. Expenses are not usually asked for in the petition, but form a proper charge against the estate where the petition has been reasonably presented. Where the Accountant of Court has reported favourably on the petition, the expenses of the latter are usually granted to the petitioner, even where the Court disapproves of the report of the accountant and refuses the prayer.<sup>9</sup> Where the Court disapproves of the report of the Accountant of Court reporting against the granting of special powers and grants the prayer of the petition, expenses are granted out of the estate.<sup>10</sup> It is only in very special circumstances that the Court will grant the prayer of a petition for special powers

<sup>1</sup> *Cochrane v. M'Aslan*, 1849, 12 D. 147.

<sup>2</sup> *Stewart v. Campbell*, 1830, 8 S. 512; *Raeburn, Petr.*, 1851, 14 D. 310; *Smith, Petr.*, 1852, 24 Sc. Jur. 172.

<sup>3</sup> *Cleugh v. Taylor*, 1837, 9 Sc. Jur. 291.

<sup>4</sup> *Morton v. Morton*, 1837, 9 Sc. Jur. 346.

<sup>5</sup> *Brown v. Brown*, 1852, 14 D. 856; *Hill v. Piercy*, 1854, 16 D. 425.

<sup>6</sup> *Halliday's Curator Bonis*, 1912 S.C. 509.

<sup>7</sup> *Greig v. Miller*, 1842, 4 D. 662; *Stewart v. Morrison*, 1892, 19 R. 1009; *Marshall v. Chisholm*, 1901, 3 F. 642; see 12 & 13 Vict. c. 51, s. 6.

<sup>8</sup> Mackay, Manual, p. 656.

<sup>9</sup> See *Gilligan's Factor v. Fraser*, 1898, 25 R. 876, where it was pointed out that the factor had pursued a proper course in presenting the petition.

<sup>10</sup> *Youngs, Petrs.* (O.H.), 1905, 43 S.L.R. 648.

which have already been exercised without the authority of the Court. This was done in *Aikman*,<sup>1</sup> with expenses out of the estate. In the usual case, the factor so acting will be held personally liable in the entire sums which he has paid out in excess of his power.<sup>2</sup> The expenses of opposition to such petitions are dealt with on similar lines to the expenses of opposition to petitions for appointment.<sup>3</sup>

#### SUBSECTION (16).—*Sequestration.*

##### (i) *Expenses of Petition.*

**1283.** The petitioning or concurring creditor is entitled to payment by the trustee, when appointed, out of the first of the funds which come into his hands, of the expenses incurred by such creditor in obtaining the sequestration and doing the other acts required by the statute prior to the election of trustee, as the same shall be taxed.<sup>4</sup> In a case founded upon an earlier statute<sup>5</sup> where the same words are used, "the first of the funds" were held to be the funds in the hands of the trustee not affected by adjudications.<sup>6</sup> Full expenses will be recoverable, even where nothing is said about expenses of process by the Court awarding sequestration,<sup>7</sup> but only necessary expenses.<sup>8</sup> If the agent of the petitioning creditor has disbursed them, he is entitled to demand them from the trustee.<sup>9</sup> The trustee, however, is not personally responsible unless express employment can be instructed.<sup>10</sup> Where a solicitor is a petitioning creditor and acts as his own agent in the petition, it would seem that he is entitled to charge full fees.<sup>11</sup>

##### (ii) *Expenses in Competition for Trusteeship.*

**1284.** The expenses of the competition are payable by the unsuccessful to the successful party, and must not be paid out of the estate.<sup>12</sup> The Court, however, where the objectors have had some success, have modified the expenses,<sup>13</sup> and also where the successful objections have been first stated on appeal.<sup>14</sup> Where the election of a trustee has been declared void, no expenses are given to any of the competing parties.<sup>15</sup>

<sup>1</sup> *Aikman, Petr.*, 1863, 1 M. 1140; *Blair's Curator Bonis, Petr.* (O.H.), 1921, 1 S.L.T. 248.

<sup>2</sup> *Semple v. Tennant*, 1888, 15 R. 810.

<sup>3</sup> Mackay, Manual, p. 656.

<sup>4</sup> Bankruptcy (Scotland) Act, 1913, s. 40; Goudy on Bankruptcy, 4th ed., p. 151; *Thomson v. Another, Petrs.* (O.H.), 1918, 1 S.L.T. 36.

<sup>5</sup> 2 & 3 Vict. c. 41.

<sup>6</sup> *Taylor v. Hunter*, 1840, 2 D. 512 and 812.

<sup>7</sup> *Baillie v. Grant*, 1833, 11 S. 609.

<sup>8</sup> *Dalrymple v. Keddlie's Tr.*, 1823, 2 S. 355; *Accountant in Bankruptcy v. Gow*, 1862, 1 M. 124.

<sup>9</sup> *Cook v. Jeffrey*, 1831, 9 S. 667; *Bell v. Mudie*, 1854, 16 D. 915.

<sup>10</sup> Bankruptcy (Scotland) Act, 1913, s. 53; *Bell v. Mudie, supra*.

<sup>11</sup> *Chamberlayne*, 1850, 19 L.J. (N.S.), Bankr. 10.

<sup>12</sup> Bankruptcy (Scotland) Act, 1913, s. 68; Goudy, *op. cit.*, p. 209.

<sup>13</sup> *Dyce v. Paterson*, 1847, 9 D. 1161.

<sup>14</sup> *Menzies v. Duff*, 1851, 13 D. 1044.

<sup>15</sup> *Mackersey v. Galloway*, 1841, 3 D. 1213; *Miller v. Sorley*, 1846, 8 D. 1207; *Lawrie v. Harvey*, 1848, 10 D. 1236.

(iii) *Liability of Trustee for Expenses.*

**1285.** A trustee is personally liable in the expenses of litigation to the opposite party when begun by the former.<sup>1</sup> If the litigation has been started by the bankrupt prior to sequestration and adopted by the trustee, the liability of the latter extends to the whole expenses from the beginning.<sup>2</sup> In like manner, if the trustee sists himself as a defender and defends the action, he becomes liable for the sum sued for and the expenses.<sup>3</sup> The expenses of sisting are to be included in the expenses of process.<sup>4</sup> It must, however, be clearly shewn that the trustee has really adopted the bankrupt's case, and not merely that the trustee has sisted himself in order to make inquiries.<sup>5</sup> The trustee cannot adopt the bankrupt's case and at the same time attach the condition that he will not be liable for expenses.<sup>6</sup> If a mistake is made in a sequestration by the trustee, the expense incurred falls upon the trustee personally.<sup>7</sup> When it is intended to make a trustee personally liable, decree should be taken against him individually and not *qua* trustee.<sup>8</sup> Where a trustee was removed, after an award of expenses had been given in his favour in an action, and the judgment was reclaimed, he was refused to be sisted afterwards with a view to the disposal of the question of expenses.<sup>9</sup> The expenses of a law agent for the bankrupt in conducting the earlier stages of a case adopted by the trustee are not a charge against the latter. If the law agent holds no security, he must rank for a dividend.<sup>10</sup> It is always best for the trustee, in undertaking litigation, to obtain a mandate from such creditors as are willing to undertake proceedings,<sup>11</sup> but before calling upon such guarantors he should first exhaust the estate.<sup>12</sup> A trustee is bound to allow a creditor, in certain circumstances, to intervene in a process, but the trustee and the trust estate must be kept *indemnitis*.<sup>13</sup>

(iv) *Liability of Creditors for Expenses.*

**1286.** Creditors are not now liable personally for any of the expenses of the trust, and if the trustee has made any payment, he has only

<sup>1</sup> Goudy on Bankruptcy, p. 347; *Jeffrey v. Brown*, 1821, 1 S. 103, *affd.*, 2 Sh. App. 349; *Gibson v. Pearson*, 1833, 11 S. 656; *Steven v. Reynolds & Co.*, 1891, 18 R. 422; *Cowie v. Muirden*, 1893, 20 R. (H.L.) 81.

<sup>2</sup> *Torbet v. Borthwick*, 1849, 11 D. 694; *Ellis v. Ellis*, 1870, 8 M. 805.

<sup>3</sup> *Watson v. Duncan* (O.H.), 1896, 4 S.L.T. 75.

<sup>4</sup> *Barron v. Black*, 1908, 16 S.L.T. 180.

<sup>5</sup> *Muir v. Tay Marine Insurance Co.*, 1843, 5 D. 579.

<sup>6</sup> *Sandeman v. Low*, 1835, 13 S. 1037; *Ellis v. Ellis*, *supra*.

<sup>7</sup> *A. B., Petr.*, 1855, 18 D. 286.

<sup>8</sup> *Craig v. Hogg*, 1896, 24 R. 6.

<sup>9</sup> *Mackenzie v. Fowler*, 1897, 24 R. 1080.

<sup>10</sup> *Peddie v. Davidson*, 1856, 18 D. 1306; *Swan v. Jeffrey*, 1829, 7 S. 268.

<sup>11</sup> Bell, Com. on Recent Statutes, p. 146; Goudy on Bankruptcy, p. 228.

<sup>12</sup> *Johnstone v. Carlyle*, 1832, 10 S. 657.

<sup>13</sup> *Edgar v. Kennedy and Hutton's Tr.*, 1905, 7 F. 452.



relief against the estate.<sup>1</sup> Creditors may, however, incur responsibility by directly instructing the trustee to undertake, or by themselves undertaking, obligations.<sup>2</sup>

(v) *Miscellaneous.*

**1287.** Where a petition has been presented against a trustee, judicial factor, or the commissioners, by any party interested, in terms of s. 82 of the Bankruptcy (Scotland) Act, 1913, and such application should not have been made, the party complained of is entitled to his full expenses, either out of the funds, or recovered from the party complaining (s. 86). By s. 158 of the Bankruptcy (Scotland) Act, 1913, the Accountant of Court is entitled to inquire into the complaint of any creditor with regard to the performance or non-performance of the duties of trustees and commissioners, and to report thereon to the Court. Any creditor who gives useful information to the Accountant, upon which the Accountant acts, is entitled to the expenses incurred by him in connection therewith.<sup>3</sup>

**1288.** It is not competent for a trustee to appeal against a judgment of the Sheriff recalling a deliverance of the trustee giving certain creditors a preference. The secured creditors, whose claim the Sheriff disallowed, are entitled to be sisted upon payment of all the expenses incurred and to be incurred in defending their interests.<sup>4</sup> Where a trustee appealed against a deliverance of commissioners fixing his commission, and the Lord Ordinary ordered service on the commissioners, who appeared and discussed a report from the Accountant in Bankruptcy to whom the question had been remitted, the Lord Ordinary recalled the deliverance and found the commissioners liable in modified expenses. The Second Division, however, held that in the special circumstances of the case the commissioners were entitled to their expenses out of the estate up to the date of the Accountant's report.<sup>5</sup> It is still a question whether, in the ordinary case, commissioners have the duty imposed on them of defending their own deliverances without special authority from the creditors.<sup>5</sup> The expense of a petition for recall of a sequestration will not be awarded to the petitioner.<sup>6</sup>

SUBSECTION (17).—*Liquidation Proceedings.*

**1289.** The expenses of petitioners for liquidation of a company used to be granted as a matter of course, but the practice is now altered, and the question is left to the Lord Ordinary to whom the liquidation

<sup>1</sup> Bankruptcy (Scotland) Act, 1913, s. 53 ; Goudy on Bankruptcy, pp. 152, 228.

<sup>2</sup> *Barclay v. Glendonach Distillery Co.*, 1868, 7 M. 9.

<sup>3</sup> *Accountant in Bankruptcy v. Peacock's Tr.*, 1867, 6 M. 158.

<sup>4</sup> *Skinner's Tr. v. Keith*, 1887, 14 R. 563.

<sup>5</sup> *Russell v. Taylor*, 1869, 8 M. 219.

<sup>6</sup> *Smith Bros. & Co. v. Roston*, 1860, 23 D. 140 ; *Riddell v. Galbraith*, 1896, 24 R. 51 ; Goudy, *op. cit.*, p. 146.

is remitted.<sup>1</sup> The expense of putting a company into liquidation forms a first charge on the assets, but the liquidator must first pay the necessary expenses of ingathering the same.<sup>2</sup> Poor rates do not take precedence of liquidator's fees and the law expenses incurred by him in the liquidation.<sup>3</sup> Where the assets are insufficient to pay the expenses of a creditor's liquidation, it has been held that the liquidator's solicitor should be ranked first, the liquidator second, and the petitioning creditor third.<sup>4</sup> In another case, where the assets were insufficient to meet all the preferable claims, there was first deducted the expense of bringing the estate into the possession of the liquidator, and upon the balance there was ranked (1) the expenses allowed in the interlocutor placing the voluntary liquidation under supervision, and appointing a liquidator in place of the voluntary liquidator; (2) the cost of material and the cash supplied to the voluntary liquidator; (3) the liquidator's agents' accounts; and (4) rates, taxes, and servants' wages; which exhausted the fund, leaving no remuneration to the liquidator.<sup>5</sup>

1290. Where a petition by a creditor for winding up was opposed by the shareholders, who desired a supervision order, the Court granted the latter, and found the petitioner and the respondents entitled to expenses as between agent and client.<sup>6</sup> In similar circumstances the petitioning creditor's expenses, prior to the date of the petition for a supervision order by the company, were alone held to be expenses in the liquidation.<sup>7</sup> Where leave to raise an action against a company in liquidation was granted by the Court, which action was successful, the expenses of the petition were not allowed as expenses in the action.<sup>8</sup> Where the petition for leave to proceed was opposed by the company, and authority was granted with expenses, the auditor disallowed the expenses prior to the date of lodging answers. The petitioner objected and the Court sustained the objection, in respect that the contention that no extra expense was occasioned prior to the lodging of answers was not taken timeously.<sup>9</sup> The objection to a liquidator named in the winding-up petition should be stated verbally at the calling, and the expenses of answers will be disallowed.<sup>10</sup> Shareholders and creditors who reclaim to the Inner House from the Lord Ordinary to whom the liquidation has been remitted, will usually be found liable in expenses if unsuccessful.<sup>11</sup> A law agent who defended actions for the company

<sup>1</sup> *Wishart, Petr.*, 1908 S.C. 690.

<sup>2</sup> *Forbes, Dallas & Co. in re Northern Distilleries, Ltd. (in Liquidation)* (O.H.), 1901, 9 S.L.T. 213.

<sup>3</sup> *Scottish Drug Depot, Ltd.*, 1905, 7 F. 646.

<sup>4</sup> *Whigham v. Walker*, 1906, 44 S.L.R. 10; 14 S.L.T. 61.

<sup>5</sup> *Robertson v. Drummond*, 1908, 45 S.L.R. 678; 15 S.L.T. 1067.

<sup>6</sup> *M'Gregor v. Ballachullish Slate Quarries Co.*, 1908 S.C. 1.

<sup>7</sup> *Pattullo v. Caithness Flagstone Co., Ltd.*, 1908 S.C. 25.

<sup>8</sup> *County of London, etc., Electric Lighting Co., Ltd. v. Patersons, Ltd.*, 1900, 7 S.L.T. 408.

<sup>9</sup> *Anderson's Trs. v. Jas. Donaldson & Co., Ltd.*, 1908 S.C. 385.

<sup>10</sup> *Hume v. Directors of Highland Peat Fuel Co.*, 1876, 3 R. 881.

<sup>11</sup> *Liqr. of the Property Investment Co. of Scotland, Ltd. v. Black*, 1893, 20 R. 1044.

prior to liquidation is not entitled to have his expenses treated as expenses of the liquidation.<sup>1</sup> The expenses of a second petition for winding up a company were allowed where there was a reasonable fear that the first would be withdrawn.<sup>2</sup>

## SECTION 7.—PARTICULAR PARTIES.

### SUBSECTION (1).—*The Crown*.<sup>3</sup>

**1291.** By the Crown Suits Act, 1855,<sup>4</sup> and the Court of Exchequer (Scotland) Act, 1856,<sup>5</sup> the Crown is placed in the same position as a subject with regard to expenses in all causes depending before any civil Court in Scotland, whether as pursuer or defender. In the case of *Lord Advocate v. Matheson* <sup>6</sup> the Crown was unsuccessful in a civil cause and moved for a decree in a special form, but the Court refused to pronounce any other than an ordinary decree against the Lord Advocate, and intimated that if the Crown refused to pay the expenses decerned for, their creditor was entitled to recover them in the ordinary way. In a prosecution before the Justice of Peace Court at the instance of an officer of excise for a contravention of the excise law, it was held that expenses could not be awarded against the Crown, as the Justice of Peace Court was not then sitting as a civil Court in the sense of the Court of Exchequer Act.<sup>7</sup> Where the Court of Exchequer returned an opinion on a stated case in such a prosecution, it was held incompetent to award expenses,<sup>8</sup> though in an ordinary appeal it is competent.<sup>9</sup> In a suspension of a conviction in a prosecution, however, it was held competent to award expenses.<sup>10</sup>

**1292.** By the Summary Jurisdiction Act, 1908,<sup>11</sup> s. 52, “expenses shall not be awarded to or against any person prosecuting in the public interest, unless the statute or order under which proceedings may be taken, directly or by implication, authorises such award.” A somewhat similar provision appeared in the Summary Procedure Act, 1864,<sup>12</sup> and it was held in proceedings under the last-mentioned Act that where in the statute under which the prosecution is brought expenses may be awarded against the accused, the Court is entitled in like manner to award expenses against the Crown, if the latter is unsuccessful, although no such express provision appears in the statute.<sup>13</sup> A person

<sup>1</sup> *Hamilton v. White*, 1906, 44 S.L.R. 38; 14 S.L.T. 587.

<sup>2</sup> *Graham v. Edinburgh Theatre Co., Ltd.*, 1877, 4 R. 1140.

<sup>3</sup> Maclaren, p. 137.

<sup>4</sup> 18 & 19 Vict. c. 90.

<sup>5</sup> 19 & 20 Vict. c. 56.

<sup>6</sup> 1866, 1 S.L.R. 174.

<sup>7</sup> *White v. Simpson*, 1862, 1 M. 72; *Allice v. Scott*, 1863, 1 M. 406; *The Queen v. Gilroys*, 1866, 4 M. 656.

<sup>8</sup> *The Queen v. Beattie*, 1866, 5 M. 191; *Wilson v. M'Intosh Brothers*, 1878, 5 R. 1097.

<sup>9</sup> *Massie v. Richardson* (O.H.), 1900, 8 S.L.T. 238.

<sup>10</sup> *Allison v. Watson*, 1862, 1 M. 87.

<sup>11</sup> 8 Edw. VII. c. 65.

<sup>12</sup> 27 & 28 Vict. c. 53.

<sup>13</sup> *Walker v. Bathgate*, 1873, 11 M. 956.



convicted by the Sheriff of a contravention of the Mines Regulation and Inspection Act, 1860, appealed to the Court of Session and it was held that the Court had power, on dismissing the appeal, to award expenses to the procurator-fiscal, although the Act conferred no power to grant expenses on the inferior Court.<sup>1</sup>

#### SUBSECTION (2).—*Mandatary*.<sup>2</sup>

**1293.** A mandatary becomes liable for the whole expenses of process incurred during the time that he acts in that capacity, and he cannot, by merely lodging a minute withdrawing from the process, escape liability for the expenses already incurred, though he may in that way put a stop to liability for future expenses.<sup>3</sup> A mandatary sisted during the dependence of a process was held liable for the whole expenses in which the pursuer was liable.<sup>4</sup> A mandatary is not entitled to stipulate that he will not be held liable in expenses.<sup>5</sup> The mandatary of a foreigner on the poor roll is not liable in expenses.<sup>6</sup> A mandatary may be found liable, though there is no formal minute sisting him, if he holds himself out and acts as mandatary.<sup>7</sup> Where the pursuer's mandatary on the day of the jury trial lodged a minute of withdrawal before the jury were empanelled, and the pursuer did not appear and the defender took a verdict, the mandatary was held liable for fees to counsel and agents and payment of witnesses and jury, and expenses of audit.<sup>8</sup>

#### SUBSECTION (3).—*Dominus litis*.<sup>9</sup>

**1294.** It is difficult to arrive at an exact definition of *dominus litis*. In *Mathieson v. Thomson*,<sup>10</sup> *dominus litis* is defined as "a party who has an interest in the subject-matter of the suit, and through that interest a proper control over the proceedings in the action." Lord Kyllachy, however, in *Fraser v. Malloch*,<sup>11</sup> after an exhaustive review of the authorities to date, arrived at the conclusion that the question to be determined is whether in initiating and conducting an action the nominal pursuer (or defender, as the case may be) is acting, not as a principal, but as an agent. In *Kerr v. Employers' Liability Assurance Corporation*<sup>12</sup> the First Division refused to accept Lord Kyllachy's view of principal and agent, and reverted to the definition in *Mathieson*. In *M'Cuaig v. M'Cuaig*<sup>13</sup> Lord Kyllachy's definition and judgment were quoted with approval. Finally, in *Harvey v. Corporation of Glasgow*,<sup>14</sup>

<sup>1</sup> *Nimmo v. Clark & Wilson*, 1872, 10 M. 477.

<sup>2</sup> Maclaren, p. 143.

<sup>3</sup> *Erskine v. Walker's Trs.*, 1883, 10 R. 717.

<sup>4</sup> *Renfrew & Brown v. Mags. of Glasgow*, 1861, 23 D. 1003.

<sup>5</sup> *Robertson & Co. v. Exley Dimsdale & Co.*, 1833, 11 S. 320.

<sup>6</sup> *Middlemas v. Brown*, 1826, 6 S. 511.

<sup>7</sup> *Cullen v. Brown*, 1860, 22 D. 1090.

<sup>8</sup> Maclaren, p. 147.

<sup>9</sup> 1896, 23 R. 619.

<sup>10</sup> 1909 S.C. 355.

<sup>8</sup> *Chapman v. Balfour*, 1875, 2 R. 291.

<sup>10</sup> 1853, 16 D. 19, per Lord Rutherford.

<sup>12</sup> 1899, 2 F. 17.

<sup>14</sup> 1915 S.C. 600.

the law as stated in *Mathieson v. Thomson* was approved. Lord Justice-Clerk Macdonald said:<sup>1</sup> "It is not easy to give any exact definition of what constitutes a *dominus litis*. He is, of course, a party standing behind the actual party to the suit in regard to which the position of *dominus* is alleged against him. The answer to the question whether he is in the position of *dominus* turns very much on the question whether he was, by his interference and exercise of control over the litigation, the cause of expense to the other party in conducting his case in which he proved to be in the right. This, of course, does not cover the case in which the alleged *dominus* has done nothing more than give financial aid to the litigant to carry on his proceedings. That may not involve control at all." Lord Salvesen<sup>2</sup> adopted the test suggested by Lord President Dunedin in *M'Cuaig v. M'Cuaig*. The true test of whether a party is or is not *dominus litis* is probably whether he has or has not the power to compromise the action.

1295. Where a pursuer has alienated, or is divested of, the subject of the action, so that he is no longer interested, the transferee is held to be *dominus litis*, and the pursuer may be compelled to find security for expenses,<sup>3</sup> or the true *dominus litis* may be required to sist himself as a party.<sup>4</sup> In *Hepburn v. Tait*,<sup>5</sup> however, a female pauper, who sued for aliment for an illegitimate child, was held to have a sufficient title to sue alone, notwithstanding that the parochial board was the true *dominus litis*. If the true interest remains with the pursuer, the transferee is not a *dominus litis*.<sup>6</sup> The transference in the case of *M'Cuaig* was to a law agent in security of a much less sum than the claim in the action. Neither is one *dominus litis* if his interest is not direct, nor his control certain and continuous.<sup>7</sup> An insurance company, with whom a defender was insured, and in whose hands was the defence, was held to be *dominus litis*, and liable in a subsequent action for the expenses of the original action.<sup>8</sup> An aunt who raised an action in name of her nephew against his father for payment of *legitim* was held to be the true *domina litis*, and liable in the expenses of a *curator ad litem* to the pursuer appointed by the Court;<sup>9</sup> and a trustee, who, though assolzied as an individual, continued actively to defend an action *qua* trustee—a position which it was ultimately found that he never held—was found to be the true *dominus litis*.<sup>10</sup> Again, the secretary of a company who defended an action without the authority of his directors was found personally liable in expenses,<sup>11</sup> and the members of a church committee,

<sup>1</sup> 1915 S.C. 607.

<sup>2</sup> *Ibid.*, at p. 609.

<sup>3</sup> *Walker v. Kelly's Tr.*, 1843, 2 Bell's App. 57.

<sup>4</sup> *Fraser v. Dunbar*, 1839, 1 D. 882; *Fraser v. Duguid*, 1838, 16 S. 1130; *Waddel v. Hope*, 1843, 6 D. 160; *Fraser v. Malloch*, *supra*.

<sup>5</sup> 1874, 1 R. 875.

<sup>6</sup> *M'Cuaig v. M'Cuaig*, *supra*.

<sup>7</sup> *Mathieson v. Thomson*, *supra*.

<sup>8</sup> *Kerr v. Employers' Liability Assurance Corporation*, 1899, 2 F. 17.

<sup>9</sup> *Walker v. Walker*, 1903, 5 F. 320.

<sup>10</sup> *Mitchell v. Baird*, 1902, 4 F. 809.

<sup>11</sup> *Edington v. Dunbar Steam Laundry Co.*, 1903, 11 S.L.T. 112.

who had raised an action for payment of debt without the consent of three of their number, were obliged to delete the names of the latter from the action and were found liable in expenses.<sup>1</sup> In a declarator of public right-of-way by three labouring men, who were merely nominees of wealthy parties, the Court ordered the pursuers to find caution for expenses in the event of the defenders being successful;<sup>2</sup> but in the subsequent case of *Potter v. Hamilton*,<sup>3</sup> where three working men were nominees of a committee of working men, the Court allowed them to proceed without caution for expenses. In the case of *Robertson v. Duke of Atholl*,<sup>4</sup> where the averments were similar to those in the case of *Jenkins v. Robertson*,<sup>2</sup> the Lord Ordinary granted a proof of the defender's averments that the pursuer was merely a man of straw put forward by wealthy parties. A defender obtained a decree for expenses against the pursuer and thereafter assigned his interest therein to a third party; this assignee raised an action for the amount of the expenses against persons who were not named in the decree, averring that they had been the true *domini litis* in the prior action; it was held that he had no title to sue.<sup>5</sup>

#### SUBSECTION (4).—*Husband and Wife.*

**1296.** A married woman may now sue and be sued as if she were not married. Her husband has no liability for contracts or obligations entered into or incurred by her on her own behalf. The former rules as to actions in connection with the property of a married woman and other actions by and against her are now only of historical interest.<sup>6</sup> But a wife is entitled to obtain legal assistance for the protection of her safety or the vindication of her character.<sup>7</sup> If she be possessed of separate estate she must do this at her own charges. If she has no separate estate her husband will be liable for her legal expenses, on the same ground as for food and clothing supplied to her, provided such expenses be reasonably and properly incurred.<sup>8</sup> Actions of divorce and separation and aliment are necessities, and the wife's expenses as between agent and client are chargeable against the husband.<sup>9</sup> The expenses in petitions for custody of children, however, are not necessities, and if the wife is successful, are only given as between party and party.<sup>10</sup> As a husband is not responsible for the slanders uttered by his wife, nor for any *quasi-delicts* or *delicts*, the expenses of actions of damages in

<sup>1</sup> *Cambuslang West Church Committee v. Bryce*, 1897, 25 R. 322.

<sup>2</sup> *Jenkins v. Robertson*, 1869, 7 M. 739.

<sup>3</sup> 1870, 8 M. 1064.

<sup>4</sup> 1905, 42 S.L.R. 601.

<sup>5</sup> *Rose v. Stevenson*, 1888, 15 R. 336.

<sup>6</sup> 10 & 11 Geo. V. c. 64, ss. 1 and 3; Walton, *Husband and Wife*, 2nd ed., p. 265.

<sup>7</sup> *M'Alister*, 1762, M. 4036; *A.B. v. C.D.*, 1906, 8 F. 973; Fraser, *Husband and Wife*, i. 614; Walton, *ibid.*, 110.

<sup>8</sup> *Brown v. Graham*, 1829, 1 Sc. Jur. 50; *Young v. Cowper*, 1825, 4 S. 83; *Lothian v. Todd*, 1829, 1 Sc. Jur. 129; Maclaren, p. 154.

<sup>9</sup> Paras. 1254 *et seq.*

<sup>10</sup> Para. 1262, *supra*.



respect of the same will not be given against the husband.<sup>1</sup> The expenses of actions with regard to the separate estate of a wife where the husband does not or has no right to interfere, cannot be charged against the husband.<sup>2</sup>

**1297.** Under the old law the mere fact of a husband granting his concurrence to an action at the instance of his wife did not *per se* render him liable for expenses,<sup>3</sup> in the case where the wife's action was not held to be a necessary. If, however, the husband had taken an active and leading part in the litigation, he was found liable.<sup>4</sup> Although even formal concurrence is now unnecessary, the same principle applies, and if a husband takes a leading part in his wife's action he may be liable in expenses.<sup>5</sup> In a case where a wife with the consent and concurrence of her husband raised an action for the death of their child, the action was held incompetent, and no expenses were awarded against the husband, who had simply consented.<sup>6</sup> In one case<sup>7</sup> an unmarried woman who was defender in an action married during its dependence, and the husband sisted himself voluntarily "as administrator in law for the defender and for any interest he might have." The Lord Ordinary decerned against the defenders, and found them liable "as aforesaid" in expenses. On the defenders reclaiming, the Court adhered and gave decree, conjunctly and severally, against husband and wife for expenses in the Inner House, in respect that the husband had interfered in the conduct of the defence and caused unnecessary expense and trouble.

#### SUBSECTION (5).—*Parent and Child.*<sup>8</sup>

**1298.** Where a parent sues as tutor and administrator for a pupil child, he is personally liable for expenses in the event of the action being unsuccessful.<sup>9</sup> But in cases of minority a father who gives his consent to an action at the instance of his child, merely to make the action competent, will not be found liable for expenses.<sup>10</sup> Should, however, the father take a prominent part in the litigation, expenses will be awarded against him,<sup>11</sup> or, at all events, he will be found liable

<sup>1</sup> *Baillie v. Chalmers*, 1791, 3 Pat. 213; *Martin v. Murray*, 1803, Hume 619; *Barr v. Neilsons*, 1868, 6 M. 651; *Scorgie v. Hunter*, 1872, 9 S.L.R. 292; *Milne v. Smiths*, 1892, 20 R. 95; *Mullen v. White*, 1881, 18 S.L.R. 493.

<sup>2</sup> *Biggart v. Liquidators of City of Glasgow Bank*, 1879, 6 R. 470; *Laing v. Provincial Homes Investment Co.*, 1909 S.C. 812.

<sup>3</sup> *Kerr v. Malcolm*, 1906, 14 S.L.T. 358.

<sup>4</sup> *Lindsay v. Kerr*, 1891, 28 S.L.R. 267; *Macgown v. Cramb*, 1898, 25 R. 634; *Maxwell v. Young*, 1901, 3 F. 638; *Picken v. Caledonian Rly. Co.*, 1901, 4 F. 39; *Schmidt v. Caledonian Rly. Co.*, 1903, 5 F. 648; *Kerr v. Malcolm*, *supra*.

<sup>5</sup> Walton, Husband and Wife, 2nd ed., pp. 110 *et seq.*; *M'Millan v. MacKinlay*, 1926 S.C. 436.

<sup>6</sup> *Whitehead v. Blaik*, 1893, 20 R. 1045.

<sup>7</sup> *Herriot v. Jacobsen*, 1909 S.C. 1228.

<sup>8</sup> *White v. Steel*, 1894, 21 R. 649.

<sup>10</sup> *Armstrong v. Thompson* (O.H.), 1895, 2 S.L.T. 537; *Currie v. Cowan & Co.* (O.H.), 1911, 2 S.L.T. 467.

<sup>11</sup> *Fraser v. Cameron*, 1892, 19 R. 564; *Docherty v. Glasgow Tramway and Omnibus Co.*, 1895, 2 S.L.T. 406.

<sup>8</sup> Maclaren, pp. 230 *et seq.*

jointly and severally with the minor.<sup>1</sup> A mother who concurred in an action by her son, and who was not personally interested in the subject of the action, was yet found liable in expenses, in respect that she made no appearance to oppose the motion for expenses against her, though due notice had been given to her. Where a pupil litigant was contesting the validity of a will, his father, as his tutor, was held not entitled to an award payable out of the estate of the deceased, to enable him to proceed with an appeal to the House of Lords.<sup>2</sup>

#### SUBSECTION (6).—*Several Pursuers.*<sup>3</sup>

**1299.** Where separate actions for damages in respect of the death of a father were brought by (1) his widow as an individual and as tutrix of his pupil children, and (2) his minor children, Lord President Clyde observed, "So far as this case<sup>4</sup> is concerned I think we may allow the expenses of the two summonses; but it must be understood that, if this practice should become general, it may be necessary to lay down some general rule which will bring it to an end, and, if necessary, penalise it." Questions of some complication occasionally arise in cases where there are several pursuers and not all are successful.<sup>5</sup> Where a wife and children sued for the death of husband and father, employing the same law agent, and the jury gave £200 to the wife and nothing to the children, the wife was found entitled to expenses, and the motion to have the children found liable in expenses was refused.<sup>6</sup> A mother as an individual and as tutrix for her three children raised an action of damages; before the trial the defender tendered to her £400 for herself, £50 for one child, and £25 for each of the other two children, which the pursuer refused; the jury having awarded £350 to the pursuer for herself, and £150 for each of the three children, the pursuer was held entitled to full expenses.<sup>7</sup> Where there are several pursuers, and one abandons his case, the defender is entitled to absolvitor and to expenses against him, so far as occasioned by him, without awaiting the issue of the action which is being prosecuted by the remaining pursuers.<sup>8</sup> Where a pursuer dies during the dependence of the action, the remaining pursuers, if successful, are entitled to the expenses of process.<sup>9</sup>

#### SUBSECTION (7).—*Several Defenders.*

**1300.** The general rule as to the liability of the unsuccessful pursuer for the expenses of several successful defenders having the same ground

<sup>1</sup> *Wilkinson v. Kinneil Cannel and Coking Coal Co.*, 1897, 24 R. 1001; *Rodger v. Weir*, 1917 S.C. 300.

<sup>2</sup> *Walker v. Whitwell*, 1914 S.C. 560.

<sup>3</sup> *Maclaren*, p. 157.

<sup>4</sup> *Slorach v. Kerr & Co.*, 1921 S.C. 285.

<sup>5</sup> *Grangemouth and Forth Towing Co. v. Steamship "River Clyde" Co.* (O.H.), 1908, 16 S.L.T. 638; *Karrman v. Crosbie*, 1898, 25 R. 931; *Wilson v. Rapp* (O.H.), 1911 S.C. 1360.

<sup>6</sup> *M'Phail v. Caledonian Rly. Co.*, 1903, 5 F. 306.

<sup>7</sup> *M'Crae v. Bryson* (O.H.), 1923, S.L.T. 164.

<sup>8</sup> *Maxtone v. Muir*, 1846, 18 Sc. Jur. 452.

<sup>9</sup> *Hay v. Earl of Morton*, 1862, 24 D. 1054.

of defence is that "each defender is entitled to lodge separate defences under the assistance and advice of his own agent and counsel. Where the record has been closed, and it appears that the defenders have not any different interest and that as regards both the same question is raised, then the Court regards it as the reasonable course that the defenders should combine, and by arrangement be represented by the same agent and counsel. If they do not do so the pursuer is only found liable to the defenders in expenses as for one appearance. Full expenses are allowed as for one defender, and only a watching fee allowed as for the other."<sup>1</sup> But in a number of cases successful defenders have not been allowed full expenses down to the closing of the record on the ground that they should have at the beginning combined to put in a single defence.<sup>2</sup> Something must turn on the circumstances of the particular case.<sup>3</sup> It is for the pursuer to establish that each defender is not entitled to full expenses.<sup>4</sup> Although each defender may be entitled to separate representation in the Outer House, it by no means follows that each is entitled to separate representation in the event of a reclaiming note being taken.<sup>5</sup> In special circumstances two or more defenders with similar interests have been allowed the expenses of separate defences.<sup>6</sup> The proper time to raise the question is at the motion for expenses and not on the Auditor's report.<sup>7</sup>

**1301.** Where several defenders have combined in a joint defence, and some are successful and some unsuccessful, the pursuer is liable to the successful defenders only for their own particular expenses and their proportion of the expenses of the joint defence.<sup>8</sup> Where two defenders conducted a joint defence until a judgment was given in the Outer House for the pursuer, when one defender settled and the other appealed to the House of Lords, who reversed, it was held that the successful appellant was entitled to his own separate expenses and one-half of the expenses incurred jointly.<sup>9</sup> Where an over-superior sued his vassal and certain sub-feuars, and the defenders united in one defence, they were all found liable in expenses, although the defence of the sub-feuars had occasioned no extra expense.<sup>10</sup> Where a pursuer succeeded against only one of four defenders who had stated the same defence, he was found entitled to his expenses from the unsuccessful defender as if the

<sup>1</sup> *Anderson v. M'Cracken Brothers*, 1900, 2 F. 780, per Lord Trayner; see also *Bell v. Goodall*, 1883, 10 R. 905; *Barrie v. Scottish Motor Traction Co.*, 1920 S.C. 704.

<sup>2</sup> *J. & G. Cockburn v. The City Club (O.H.)*, 1905, 12 S.L.T. 678.

<sup>3</sup> *Liquidator of the Consolidated Copper Co. of Canada v. Peddie*, 1877, 5 R. 393; *Burrell v. Simpson & Co.*, 1877, 4 R. 1133; *Stott v. Fender*, 1878, 16 S.L.R. 5.

<sup>4</sup> *Walsh v. Eastern Cemetery Co.*, 1894, 31 S.L.R. 687.

<sup>5</sup> *Duncan v. Salmond*, 1874, 1 R. 839.

<sup>6</sup> *Campbell v. Home's Trs.*, 1853, 15 D. 311; *Walsh v. Eastern Cemetery Co.*, *supra*; *Leslie v. Davidson*, 1858, 20 D. 787; *Stewart's Trs. v. Robertson*, 1874, 1 R. 334.

<sup>7</sup> *Duncan v. Salmond*, *supra*; *Murray v. Macfarlane's Trs.*, 1895, 23 R. 80.

<sup>8</sup> *Arthur v. Lindsay*, 1895, 22 R. 904; *Crawford v. Adams*; *Crawford v. Dunlop*, 1900, 3 F. 296.

<sup>9</sup> *Robertson v. Stewart*, 1875, 2 R. 970.

<sup>10</sup> *Glasgow Fencing and Building Co. v. Watson's Trs.*, 1887, 14 R. 718.



latter were the sole defender.<sup>1</sup> Where decree is pronounced against several defenders, conjunctly and severally, and one defender pays all the expenses, he is entitled to receive an assignation of the decree.<sup>2</sup>

**1302.** When there are two or more defenders involved in an action, each of whom insists in a separate defence, as for example in a reparation case, where each defender blames the other, questions of some nicety arise. Three cases arise (1) where the pursuer is successful against both or all the defenders, (2) where one defender is successful and the other unsuccessful, and (3) where the pursuer fails against both. It is obvious that the first case where the pursuer is successful against both or all defenders presents no difficulty. Unless the circumstances be very special, the pursuer will be awarded expenses against both jointly and severally. The second case where one defender is successful and one unsuccessful, presents some difficulty. It has been said that the Court will not lay down any general rule,<sup>3</sup> but it is conceived that the rules dealing with the matter are sufficiently hard and fast.<sup>4</sup> It is true, however, that a judge has a discretion to apply these rules with greater or less rigour as circumstances seem to demand, and some illustrations of the exercise of this discretion are noted below.<sup>5</sup>

**1303.** It appears to be well settled that the Court has power to give the successful defender expenses against the unsuccessful. It is not so certain what is the foundation of the rule. In *Brownlie v. Tennant*,<sup>6</sup> Lord Justice-Clerk Hope said: "It is not in my opinion a necessary requisite for the claim of one defender against the other that the latter has been subjected in the action to the pursuer's demand. The ground of claim by one defender against another defender is truly, in the general case, founded on the conduct of the latter as having occasioned the turn and shape of the case . . ." In *Keating v. Anderson*,<sup>7</sup> however, while affirming that the Court has an undoubted power—in cases where justice requires it—to give decree for the successful defender's expenses directly against the unsuccessful defender, the Lord President pointed out that the exercise of this power by the Court is based on the right which the pursuer would have, in such cases, to be relieved by the unsuccessful defender.<sup>8</sup> Certainly the older practice seems to have been to find the pursuer entitled to relief from the payment of these expenses against the unsuccessful defender,<sup>9</sup> and the

<sup>1</sup> *Macleod v. Heritors of Morvern*, 1870, 8 M. 528.

<sup>2</sup> *Mackay v. Mackay*, 1896, 4 S.L.T. 200.

<sup>3</sup> *M'Crae v. Bryson*, 1923 S.C. 896; *Keating v. Anderson*, 1925 S.C. 19.

<sup>4</sup> *MacLaren*, pp. 162 *et seq.*; *Keating v. Anderson*, *supra*, per Lord Sands.

<sup>5</sup> *Younger v. Traill's Tr.*, 1916, 1 S.L.T. 397, where the pursuer and one defender were held liable in one half each of the expenses of a successful defender; *Davie v. Blair*, 1912, 1 S.L.T. 420, where pursuer and unsuccessful defender jointly and severally liable to the successful defender; *Stuart v. Hannah*, 1926 S.N. 180; 1927, S.L.T. 117, where expenses were allocated, there being two unsuccessful defenders.

<sup>6</sup> 1855, 17 D. 422, at p. 425.

<sup>7</sup> 1925 S.C. 19.

<sup>8</sup> See also *Thomson v. Edinburgh and District Tramways*, 1901, 3 F. 355, per Lord Kinnear.

<sup>9</sup> *Brown v. Wemyss & Walker*, 1829, 7 S. 626; *Sym v. Charles*, 1830, 8 S. 741; *Crawcour v. St. George Steam Packet Co.*, 1843, 6 D. 190; *Cowan v. Dalziels*, 1877, 5 R. 241.

effect of *Keating v. Anderson* is to point out that the successful defender may, if he choose, prefer a decree against the pursuer to one against the unsuccessful defender,<sup>1</sup> at any rate in a case where the responsibility of calling the successful defender truly rests on the pursuer. But the general rule which is followed is to make the unsuccessful defender directly liable for expenses.

**1304.** Where the unsuccessful has blamed the successful defender and has been instrumental in bringing him into the action, a direct award of expenses will be made against him.<sup>2</sup> A direct award against the unsuccessful defender may also be made where the unsuccessful defender, though not responsible for the actual bringing in of the successful defender, has made averments of fault against him, as, for example, in cases where the pursuer has from the outset called both defenders.<sup>3</sup> The unsuccessful defender may be liable also, even although he has not expressly attributed fault to the successful defender, if his averments necessarily imply that the accident must have been due to the fault of the latter.<sup>4</sup> Where the successful defender is the defender first called and the unsuccessful defender has been brought into the action by amendment, the latter may be liable both to the pursuer and the successful defender.<sup>5</sup> Where several defenders were sued conjunctly and severally, and one defender allowed decree in absence to go out against him, the latter was held responsible for the whole expenses of the case down to the date of the decree in absence, with a right of relief against the other defenders if unsuccessful.<sup>6</sup>

**1305.** Where a pursuer who had succeeded against one of two defenders took advantage of the unsuccessful defenders' reclaiming note in order to ask for a decree against both defenders and failed thereon, he was penalised in expenses in the Inner House.<sup>7</sup> Where, however, a pursuer by the exercise of a little care in making inquiries would have been able to avoid suing the successful defender and might have brought his action against the unsuccessful defender only, he will be found liable for the expenses of the successful defender, without a right of relief against the unsuccessful one.<sup>8</sup>

**1306.** The third possibility is where all the defenders are assoilzied. Normally the pursuer will be found liable in expenses to both defenders. But cases may arise where one of the successful defenders may be found liable to the other in expenses. This follows from the general principle

<sup>1</sup> *Keating v. Anderson*, *supra*; see also *Chalmers v. Glasgow Corporation*, 1924, S.L.T. 511.

<sup>2</sup> *Thomson v. Edinburgh and District Tramways*, 1901, 3 F. 355; *Morrison v. Waters & Co.*, 1906, 8 F. 867; *Kennedy v. Shotts Iron Co., Ltd.*, 1913 S.C. 1143.

<sup>3</sup> *Caledonian Rly. Co. v. Greenock Sacking Co.*, 1875, 2 R. 671; *Craig v. Aberdeen Harbour Commrs.*, 1909 S.C. 736.

<sup>4</sup> *M'Crae v. Bryson*, 1923 S.C. 896; *Stuart v. Hannah*, 1926 S.N. 180; 1927, S.L.T. 117.

<sup>5</sup> *Laing v. Paull & Williamson*, 1912 S.C. 196.

<sup>6</sup> *Mackenzie v. Cameron*, 1852, 15 D. 61.

<sup>7</sup> *Taylor v. Glasgow Corporation*, 1919 S.C. 511.

<sup>8</sup> *Mackintosh v. Galbraith & Arthur*, 1900, 3 F. 66.

enunciated in *Brownlie v. Tennant*,<sup>1</sup> that the ground for making a defender liable is his own conduct in the case. As Lord Justice-Clerk Hope put it in that case:<sup>2</sup> “Neither do I think that it will exclude the claim of one defender against the other, that ultimately both are assoilzied.” If, then, a defender so conducts himself as to occasion expense to the other defender unnecessarily or vexatiously, he will be made liable. It may be a ground for subjecting a successful defender, if he has made such allegations against the other successful defender as to be truly equivalent to desiring him to be called into the action.<sup>3</sup>

**1307.** In *Brownlie v. Tennant*<sup>3</sup> the Court, while holding that it was competent to make one successful defender liable to the other, refused to do so in the circumstances of that particular case, on the ground that while the original defenders made the averment that the other defender was liable, they left the pursuer to take his own course and did nothing to hamper or affect the second defender by any proceedings. Accordingly the criterion seems to be whether the real responsibility of bringing in a particular defender rests on the pursuer or the other defender. Where an action of reduction of a will was directed against the testator’s law agent and the residuary legatee, the latter of whom was a minor to whom a *curator ad litem* was appointed, and both defenders were assoilzied, the law agent had to pay the expenses of the *curator*; but the decision of that case turned on the peculiar facts.<sup>4</sup> The conduct of one of the successful defenders may be such as to call for his being penalised in expenses.<sup>5</sup>

#### SUBSECTION (8).—*Trustees, Private.*<sup>6</sup>

##### (i) *Right to Expenses from the Trust Estate.*

**1308.** The general rule is that trustees have a right to charge against the trust funds the expenses of litigation undertaken on behalf of the trust, if the litigation is reasonable and properly conducted and the trustees have acted in good faith.<sup>7</sup> As a reasonable action may have an unfortunate result, the reasonableness of the action must not be determined merely by the result.<sup>8</sup> Trustees do not guarantee the success of their transactions but only undertake to give such attention to the affairs of the trust as a prudent man of business would give.<sup>9</sup> A trustee is not entitled to get his expenses simply on the plea that he

<sup>1</sup> 1855, 17 D. 422; Maclaren, p. 162.

<sup>2</sup> 17 D., at p. 425.

<sup>3</sup> Per Lord Justice-Clerk Hope in *Brownlie v. Tennant*, *supra*.

<sup>4</sup> *Rooney v. Cormack*, 1895, 23 R. 11.

<sup>5</sup> *Macdougall v. Miller*, 1900, 8 S.L.T. 284.

<sup>6</sup> Maclaren, p. 170; Menzies on Trustees, 2nd ed., s. 1180 *et seq.* In questions of expenses in cases relating to Trustees “English authority” may be usefully cited; *Brooks v. Brooks’ Trs.*, 1902, 4 F. 1014, per Lord M’Laren at p. 1047.

<sup>7</sup> *Drummond v. Carse’s Exr.* 1881, 8 R. 449; *Wemyss v. Kennedy* (O.H.), 1906, 14 S.L.T. 237.

<sup>8</sup> *Cameron v. Anderson*, 1844, 7 D. 92; *Johnstone v. Beattie*, 1856, 18 D. 343, at p. 349.

<sup>9</sup> *Stewart v. Dobie*, 1899, 1 F. 1183, per Lord M’Laren at p. 1186.



followed the advice of counsel. Such advice goes a long way to protect him, but is merely one of the considerations to be weighed.<sup>1</sup>

**1309.** In defending the validity of the trust deed under which they act, trustees have been held entitled to expenses out of the trust estate, though unsuccessful.<sup>2</sup> Where the terms of the trust deed have been ambiguous, the trustees have been found entitled to their expenses in having the difficulties solved by a decision of the Court, whether by multiplepounding, special case, or ordinary action.<sup>3</sup> They have also been found entitled to expenses where it was doubtful whether the documents left by the testator amounted to a testamentary writing.<sup>4</sup> In making a claim on behalf of, or in resisting a claim against, the trust estate, trustees are entitled to charge such expenses against the estate even when unsuccessful.<sup>5</sup> Trustees are also entitled to the expenses, from trust funds, of an action of multiplepounding and exoneration brought to distribute the estate;<sup>6</sup> and where trustees sue for their discharge they are likewise entitled to expenses.<sup>7</sup> Trustees should, however, usually rest content with the judgment of the Court of first instance, which judgment will exoner them. If they appeal unsuccessfully they are not entitled to expenses out of the trust estate.<sup>8</sup> Where trustees are found entitled to expenses, they are taxed as between agent and client.<sup>9</sup> Expenses between agent and client must be specially asked for at the time of the award of expenses, otherwise expenses will only be given as between party and party.<sup>10</sup>

**1310.** When the litigation is unreasonable or improperly conducted, trustees will not be allowed their expenses from the trust funds. Where trustees raised an action of multiplepounding which was held to be incompetent, and where trustees raised an action of multiplepounding whilst there was *in pendente* another cause in which all the questions

<sup>1</sup> *Stott v. Milne*, 1884, 25 Ch. D. 710; *Buckle v. Kirk*, 1908, 15 S.L.T. 1002; *Menzies, op. cit.*, ss. 268, 1185.

<sup>2</sup> *Munro v. Strain*, 1874, 1 R. 1039; *Watson v. Watson's Trs.*, 1875, 2 R. 344; *Watt v. Watson*, 1897, 24 R. 330; *Ross v. Ross's Trs.*, 1898, 25 R. 897; *Crichton v. Henderson's Trs.*, 1898, 1 F. 24; *Stevenson v. Currie* (O.H.), 1905, 13 S.L.T. 457; *Merrilees v. Leckie's Trs.*, 1908 S.C. 576.

<sup>3</sup> *Spens v. Monypenny's Trs.*, 1875, 3 R. 50; *Ramsay's Trs. v. Ramsay*, 1876, 4 R. 243; *Costine's Trs. v. Costine*, 1878, 5 R. 782; *Hamilton's Trs. v. Hamilton*, 1879, 6 R. 1216; *Gibson's Trs. v. Wilson*, 1899, 1 F. 1016; *Rennie's Trs. v. Watt* (O.H.), 1904, 12 S.L.T. 414.

<sup>4</sup> *Tennant v. Dunsmore*, 1878, 6 R. 150; *Whyte v. Hamilton*, 1881, 8 R. 940.

<sup>5</sup> *Gibson v. Caddall's Trs.*, 1895, 22 R. 889; *Kesson v. Aberdeen Wrights' and Coopers' Incorporation*, 1898, 1 F. 36; *Peat v. Peat's Trs.*, 1901, 38 S.L.R. 269; *Wemyss v. Kennedy* (O.H.), 1906, 14 S.L.T. 237; *Buckle v. Buckle's Curator*, 1908, 15 S.L.T. 1002.

<sup>6</sup> *Jamieson v. Robertson*, 1888, 16 R. 15; *Connell's Trs. v. Chalk*, 1878, 5 R. 735; *Dunbar v. Sinclair*, 1850, 13 D. 54.

<sup>7</sup> *Davidson's Trs. v. Simmons*, 1896, 23 R. 1117; *Erentz's Trs. v. Erentz's Judicial Factor*, 1897, 25 R. 53.

<sup>8</sup> *Stewart v. Bruce*, 1898, 25 R. 965, per Lord Moncreiff at p. 984; *Menzies, op. cit.*, s. 1202; *Turnbull's Trs. v. Lord Advocate*, 1918 S.C. (H.L.) 88.

<sup>9</sup> *Drummond v. Carse's Exr.*, 1881, 8 R. 449; *Gibson v. Caddall's Trs.*, *supra*; *Davidson's Trs.*, *supra*; *Erentz's Trs.*, *supra*; *Watt v. Watson*, *supra*; *Peat v. Peat's Trs.*, *supra*; *Wemyss*, *supra*.

<sup>10</sup> *Fletcher's Trs. v. Fletcher*, 1888, 15 R. 862.

raised in the multiplepointing would have been determined, they were not allowed their expenses from the trust estate.<sup>1</sup> Where in an action for reduction of the trust deed the trustees were held to be parties to the impetration of the deed,<sup>2</sup> and where they have unreasonably defended or conducted an action, they were held personally liable, without recourse to the trust funds,<sup>3</sup> and the fact that they have only been concluded against "as trustees" will not entitle them to charge the trust funds.<sup>4</sup> Where a trustee is removed from office for misconduct or for having an adverse interest to the trust, he will not be allowed, from the trust funds, his expenses of defending the petition.<sup>5</sup> Where, however, he has unsuccessfully defended an action to denude, he has been allowed his expenses.<sup>6</sup> The expenses of actions between trustees regarding the trust do not fall on the trust estate.<sup>7</sup> In actions between beneficiaries and trustees, when the former are successful the latter may not charge the trust with the expenses of the litigation, so as to decrease the former's legacy.<sup>8</sup> If the expenses are justifiable, trustees may be entitled to charge an estate with the expenses of opposing a Bill.<sup>9</sup>

(ii) *Liability to Third Parties.*<sup>10</sup>

**1311.** Trustees who litigate with third parties and are unsuccessful are liable in expenses to their opponents like other litigants. Where trustees are not in a position to recoup themselves out of the trust estate, as, for example, when there are not sufficient funds to meet a decree for expenses, the general rule is that trustees are personally liable for expenses incurred by their opponents.<sup>11</sup> The trustee's personal liability in a question with his own constituents is an entirely different question from his liability to an opponent.<sup>12</sup> The same rule holds in the case of a trustee in a sequestration,<sup>13</sup> and a liquidator of a company.<sup>14</sup>

<sup>1</sup> *Mackenzie v. Sutherland*, 1895, 22 R. 233; *Cruikshank's Exr. v. Cruikshank's Tr.* (O.H.), 1907, 14 S.L.T. 761.

<sup>2</sup> *Watson v. Watson's Trs.*, 1875, 2 R. 344.

<sup>3</sup> *Law v. Humphrey*, 1876, 3 R. 1192; *Graham v. Marshall*, 1860, 23 D. 41.

<sup>4</sup> *Kay v. Wilson*, 1850, 12 D. 845.

<sup>5</sup> *Thomson v. Dalrymple*, 1865, 3 M. 336; *Jackson v. Welch*, 1865, 4 M. 177; *Stewart v. Chalmers*, 1904, 7 F. 163.

<sup>6</sup> *Laidlaws v. Newlands*, 1884, 11 R. 481.

<sup>7</sup> *Fotheringham v. Salton*, 1852, 14 D. 427.

<sup>8</sup> *M'Eaehern v. Campbell's Trs.*, 1865, 3 M. 833; *Easson's Trs. v. Mailer*, 1901, 3 F. 778.

<sup>9</sup> *Nicholl*, 1878, 13 W.N. 154; *In re Earl of Berkeley's Will*, 1874, 10 Ch. 56.

<sup>10</sup> *Menzies*, *op. cit.*, s. 1264 *et seq.*

<sup>11</sup> *Muir v. City of Glasgow Bank*, 1879, 6 R. (H.L.) 21; *Craig v. Hogg*, 1896, 24 R. 6; *Cowie v. Muirden*, 1893, 20 R. (H.L.) 81; *Anderson v. Anderson's Tr.*, 1901, 4 F. 96; *Bonner's Tr. v. Bonner*, 1902, 4 F. 429; *Mulholland v. Macfarlane's Trs.* (O.H.), 1928 S.N. 28.

<sup>12</sup> *Anderson v. Anderson's Tr.*, *supra*, at p. 103.

<sup>13</sup> *Gibson v. Pearson*, 1833, 11 S. 656; *Torbet v. Borthwick*, 1849, 11 D. 694; *Hutton, Petr.*, 1899, 6 S.L.T. 401; *Cowie v. Muirden*, *supra*.

<sup>14</sup> *Consolidated Copper Co. of Canada v. Peddie*, 1877, 5 R. 393; *Ferra's case*, 1874, L.R. 9 Ch. 355; *John Smith & Sons*, 1894, 2 S.L.T. 243.

(iii) *Form of Decerniture.*

**1312.** The forms of decerniture for expenses against a trustee may be summed up as follows: <sup>1</sup> Where expenses are decerned for *simpliciter*, the trustee is liable as an individual to his opponent but the question of relief against the trust estate is left open in an accounting with the beneficiaries. <sup>2</sup> Where decree for expenses is given against the trustee "personally" he is not only liable to his opponent but the right of relief is closed to him. <sup>3</sup> If a trustee is found liable in expenses *qua* trustee, he will only be responsible so far as the funds of the trust will permit. <sup>4</sup>

SUBSECTION (9).—*Trustees, Public.*

**1313.** There is no difference between public and private trustees as regards either their right to expenses from the trust or their personal liability to third parties for expenses. <sup>5</sup> There are, however, some special points as to expenses of public trustees which may be noted. The right of statutory trustees to be relieved out of trust funds depends on whether the expense was properly incurred in the interest of the trust. So statutory trustees may charge against the trust estate the expenses of promoting a Bill to remove obscurities in their Act or practical difficulties in administration, <sup>6</sup> but not to change the purposes of the trust unless they get special parliamentary authority to do so. <sup>7</sup> It is *ultra vires* to apply the County General Assessment to pay the expenses of opposing a public general Bill, <sup>8</sup> and it is also *ultra vires* to apply the Public Health Assessment to the payment of the expenses of opposing an amalgamation Bill affecting all the interests of the community. <sup>9</sup> It is, however, quite competent to pay out of the Common Good of a burgh the expenses of opposing a Bill in Parliament, and no one except the Crown has a title to intervene. <sup>10</sup>

**1314.** By the Public Authorities Protection Act, 1893, <sup>11</sup> s. 1, where an action has been raised against any person for any act done in pursuance of any Act of Parliament, or of any public duty or authority, or of any alleged neglect in the execution of any such Act, and a judgment is obtained by the defender, it carries costs, to be taxed as between agent and client. In *Aird v. Tarbert School Board* <sup>12</sup> Lord President Dunedin and Lord Kinnear expressed the opinion that the Act does not take away the discretion of the Court to refuse expenses to the successful party

<sup>1</sup> Menzies, *op. cit.*, s. 1269.

<sup>2</sup> *Paterson's Judicial Factor v. Paterson's Trs.*, 1897, 24 R. 499, at p. 510; *Anderson v. Anderson's Tr.*, 1901, 4 F. 96; *Kilmarnock Theatre Co. v. Buchanan*, 1911 S.C. 607.

<sup>3</sup> *Kilmarnock Theatre Co. v. Buchanan*, *supra*.

<sup>4</sup> *Davidson's Tr. v. Carr*, 1850, 12 D. 1069; *Craig v. Hogg*, 1896, 24 R. 6.

<sup>5</sup> *Young v. Nith Commrs.*, 1876, 3 R. 991.

<sup>6</sup> *Perth Water Commrs. v. M'Donald*, 1879, 6 R. 1050.

<sup>7</sup> *Cowan & Mackenzie v. Law*, 1872, 10 M. 578.

<sup>8</sup> *Wakefield v. Commrs. of Supply of Renfrew*, 1878, 6 R. 259; Menzies, *op. cit.*, s. 1194.

<sup>9</sup> *Leith Dock Commrs. v. Mags. of Leith*, 1897, 25 R. 126.

<sup>10</sup> *Conn v. Corpn. of Renfrew*, 1906, 8 F. 905.

<sup>11</sup> 56 & 57 Vict. c. 61.

<sup>12</sup> 1907 S.C. 305.



or to modify expenses for good cause. All that the Act does is to provide that, if expenses are awarded, they must be taxed as between agent and client. Where the action is quite excluded by another Act, the Public Authorities Protection Act does not apply.<sup>1</sup> When awarded, expenses as between agent and client are recoverable both in the Inner and Outer Houses.<sup>2</sup> The Act was held to apply though not founded on until an amendment of record,<sup>3</sup> and in a recent case the Court went much farther, holding that it was competent to found on the Act with regard to expenses without pleading it on record at all.<sup>4</sup> But it appears from a later decision that a body moving for expenses in terms of the Act merely because they administer their undertakings under Acts of Parliament but must base their motion upon such of the enactments regulating their constitution and functions as are relevant to the question whether the action was truly one falling under the Act; accordingly such a body must place before the Court sufficient material to enable the Court to decide the question.<sup>5</sup> Where the defenders, on petition to apply the judgment of the House of Lords, claimed expenses as between agent and client, it was held that they were excluded by omission to make the motion before the Lord Ordinary or to express their dissatisfaction with his judgment allowing expenses as between party and party.<sup>6</sup> Where a county council sisted itself as defender in an action of right of way, it was held that the Act did not apply.<sup>7</sup> When public trustees obtain an interlocutory judgment, they should move to have the question of expenses reserved, for if they insist upon an award which is only as between party and party, they are precluded from going back upon it at the end of the case and moving for expenses as between agent and client.<sup>8</sup> There have been a number of decisions as to the circumstances under which public authorities may invoke the provision of the Act as to expenses. These turn on the construction of the Act itself.<sup>9</sup>

#### SUBSECTION (10).—*Curators ad litem.*

**1315.** A *curator ad litem* cannot be held liable in expenses.<sup>10</sup> He is entitled to expenses though unsuccessful.<sup>11</sup> Where, however, the

<sup>1</sup> *Davidson v. Anderson*, 1905, 13 S.L.T. 298. <sup>2</sup> *Aird v. Tarbert School Board*, 1907 S.C. 305.

<sup>3</sup> *Christie v. Glasgow Corpn.*, 1899, 36 S.L.R. 694.

<sup>4</sup> *Hunter v. Dundee Water Commrs.*, 1920 S.C. 628.

<sup>5</sup> *Livingstonia Steamship Co. v. Clyde Navigation Trs.*, 1928 S.C. 270.

<sup>6</sup> *Edinburgh and District Water Trs. v. Sommerville & Son, Ltd.*, 1907 S.C. 355.

<sup>7</sup> *M'Robert v. Reid*, 1914 S.C. 633.

<sup>8</sup> *Walsh v. Mags. of Pollokshaws*, 1907, 14 S.L.T. 845.

<sup>9</sup> *M'Phie v. Mags. of Greenock*, 1904, 7 F. 246; *Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers*, 1904, 7 F. 168; *Latham v. Glasgow Corporation*, 1921 S.C. 694; *Kemp v. Glasgow Corporation*, 1919 S.C. 71, disapproving *Eadie v. Glasgow Corporation*, 1916 S.C. 163; *Inverness County Council v. Mags. of Inverness (O.H.)*, 1908, 15 S.L.T. 966; *Morries Stirling v. Stirling County Council (O.H.)*, 1900, 7 S.L.T. 351; *Shotts Iron Co. v. Mags. of Loanhead (O.H.)*, 1921, 2 S.L.T. 244; *Montgomery v. Haddington Corporation*, 1908 S.C. 127; *Thomson v. Kilmarnock Licensing Courts (O.H.)*, 1923, S.L.T. 483; *Grant & Sons v. Mags. of Dufftown*, 1924 S.C. 952.

<sup>10</sup> *Fraser v. Pattie*, 1847, 9 D. 903.

<sup>11</sup> *Dunlop v. Brown*, 1904, 11 S.L.T. 522.

parties for whom there is a *curator ad litem* have no interest to maintain and their appearance is unnecessary, it has been held that no expenses are due in this respect.<sup>1</sup> In some cases a *curator ad litem* has been put in funds in order to carry on a litigation.<sup>2</sup> In a petition for disentail the account of a *curator ad litem* appointed to a minor called as respondent was taxed as between agent and client.<sup>3</sup>

#### SUBSECTION (11).—*Judicial Factors and Curators Bonis.*<sup>4</sup>

**1316.** According to the opinion of the majority in a bench of seven judges, a judicial factor and a *curator bonis* are each personally liable for expenses to a successful opponent,<sup>5</sup> but where the interlocutor finds a factor liable “as judicial factor” it cannot be construed as imposing personal liability on him.<sup>6</sup>

#### SUBSECTION (12).—*Law Agents.*

##### (i) *Personal Liability for Expenses.*

**1317.** The agent in a cause is personally liable in payment of clerks, and dues, of Court.<sup>6</sup> He is also personally liable for the expenses of witnesses,<sup>7</sup> even of witnesses cited to a commission by the party himself and not by the agent.<sup>8</sup> He is also personally responsible in the case of havers.<sup>9</sup> Havers cannot be compelled to produce under a specification until paid their witness and search fees, but not copying fees.<sup>10</sup> An agent is personally responsible for the fees of a commissioner,<sup>11</sup> though without special agreement he is not personally responsible for the fees of an accountant, engineer, or other reporter to whom a remit has been made from the Court on matters on record in a depending process.<sup>12</sup> Fees to advocates’ clerks are recoverable from the agent personally.<sup>13</sup> These fees are subject to the triennial prescription, but not if the fees have been recovered from the client by the agent, and are due and resting-owing.<sup>14</sup> Though, in general, an advocate cannot sue for fees, an agent who has recovered the same may be sued.<sup>15</sup> The agent of an unsuccessful party is personally liable for jurors’ fees, but

<sup>1</sup> *Ballantyne v. Greenock Distillery Co.*, 1893, 1 S.L.T. 74.

<sup>2</sup> *Smith v. Smith’s Tr.* (O.H.), 1900, 8 S.L.T. 226; *Crum Ewing’s Trs. v. Bayly’s Trs.*, 1910 S.C. 994; *Percy v. Percy*, 1923 S.L.T. 295.

<sup>3</sup> *Fowler, Petr.* (O.H.), 1917, 1 S.L.T. 266.

<sup>4</sup> *Maclaren*, p. 224.

<sup>5</sup> *Craig v. Hogg*, 1896, 24 R. 6.

<sup>6</sup> *A.B. v. C.D.*, 1843, 6 D. 95.

<sup>7</sup> *Jamieson v. Main*, 1830, 5 Mur. 127; *M’Donald v. Meldrum*, 1839, 1 D. 677.

<sup>8</sup> *Fraser v. Stronach*, 1885, 23 S.L.R. 76.

<sup>9</sup> *Law v. Law’s Trs.*, 1904, 12 S.L.T. 240.

<sup>10</sup> *Forsyth v. Pringle Taylor & Lamond Lowson* (O.H.), 1906, 14 S.L.T. 658.

<sup>11</sup> *A. B. v. C. D.*, *supra*; *M’Lachlan v. Flowerdew*, 1851, 13 D. 1345.

<sup>12</sup> *A.S.*, 15th July 1876.

<sup>13</sup> *Craig & Co. v. Campbell*, 1858, 20 D. 444.

<sup>14</sup> *Fortune’s Exrs. v. Smith*, 1864, 2 M. 1005.

<sup>15</sup> *Keay v. A. B.*, 1837, 9 Sc. Jur. 353; *Cullen v. Buchanan*, 1862, 24 D. 1132.

when the verdict of a jury is for a sum less than that tendered, the agents pay equally in the first instance.<sup>1</sup>

**1318.** If an agent conducts a case without the authority of his client, he is personally responsible to his opponent in expenses should his client disclaim.<sup>2</sup> Where the agent of a private pursuer in an action of declarator of contravention of law-burrows used the name of the Lord Advocate without the latter's authority, the agent was held personally liable in expenses to the defenders.<sup>3</sup> An agent is personally liable for expenses incurred through an error committed by him,<sup>4</sup> and where he improperly caused a suspension of a process-caption to be issued, he was found personally liable.<sup>5</sup> In one case,<sup>6</sup> an agent who opposed, in name of a lunatic, the appointment of a judicial factor, was held personally liable in expenses. Lord Justice-Clerk Inglis dissented from this judgment, and in a later case<sup>7</sup> his dissent was confirmed.

(ii) *Right to Expenses.*

**1319.** Where the relation of agent and client is constituted, the obligation of the client to remunerate the agent for his services is implied, unless expressly dispensed with.<sup>8</sup> An agent's fees are regulated by Act of Sederunt.<sup>9</sup> An obligation by a client to his agent, while the relation of agent and client subsists, to give a sum of money as a gift in addition to the ordinary professional charges, is, *ipso jure*, null.<sup>10</sup> A law agent may be refused his expenses incurred on behalf of his client when loss arises to his client owing to the agent's negligence or mismanagement,<sup>11</sup> but the misconduct of the country agent does not debar the town agent from recovering his full account.<sup>12</sup> An agent for a wife in a consistorial case may sue the husband for his wife's expenses.<sup>13</sup> Where there is an interlocutor awarding expenses or implying that they are due, the agent's right to them cannot be defeated by the client entering into an agreement with his opponent.<sup>14</sup> When an agent is employed by several litigants acting in common, he may charge any one of them for the whole expenses of the cause, leaving the latter with

<sup>1</sup> *Kerr v. Murray*, 1866, 2 S.L.R. 249.

<sup>2</sup> *Philip v. Gordon*, 1848, 11 D. 175; *Cowan v. Farrie*, 1836, 14 S. 634.

<sup>3</sup> *Robertson v. Ross*, 1873, 11 M. 910.

<sup>4</sup> *M'Kechnie v. Halliday*, 1856, 18 D. 659.

<sup>5</sup> *Horne v. Steele*, 1825, 3 S. 550.

<sup>6</sup> *M'Call v. Sharpe & Bayne*, 1862, 24 D. 393.

<sup>7</sup> *Mitchell & Baxter v. Cheyne*, 1891, 19 R. 324.

<sup>8</sup> *Bell v. Ogilvie*, 1863, 2 M. 336.

<sup>9</sup> C.A.S., K, iv; M, ii.; A.S., 20th July 1920, and yearly Acts thereafter.

<sup>10</sup> *Anstruther v. Wilkie*, 1856, 18 D. 405; *Gillespie v. Gardner*, 1909 S.C. 1053; *Aitken v. Campbell's Trs.*, 1909 S.C. 1217.

<sup>11</sup> *Burt v. Bell*, 1861, 24 D. 13; *Davidson & Stevenson v. Buchanan*, 1877, 14 S.L.R. 233.

<sup>12</sup> *Hamilton v. Thomson*, 1868, 6 S.L.R. 14; *Clark & Macdonald v. Schulze*, 1902, 4 F. 448.

<sup>13</sup> *Clark v. Henderson*, 1875, 2 R. 428; *Riddle v. Riddle (O.H.)*, 1904, 12 S.L.T. 361.

<sup>14</sup> *Sloss & Gemmell v. Kennedy*, 28th May 1823, F.C.; *Barr v. Wotherspoon*, 1850, 13 D. 305.



a right of relief against the other litigants.<sup>1</sup> A qualified and licensed law agent who conducts his own case will be entitled, should he be successful, to make professional charges against his opponent,<sup>2</sup> but an unlicensed agent is entitled to nothing but his outlays.<sup>3</sup>

(iii) *Agent's Account.*

**1320.** The account of a law agent in a process, whether charged as between agent and client or between party and party, is regulated by the Act of Sederunt,<sup>4</sup> and the table of fees and general regulations as to the preparation and taxation of accounts for judicial proceedings appended thereto. The triennial prescription applies to such accounts.<sup>5</sup>

**1321.** By Act of Sederunt, 6th February 1806,<sup>6</sup> a process was introduced whereby an agent or client can make a summary application to the Court or to the Lord Ordinary before whom the cause depends or has formerly depended, to get the agent's account of expenses taxed. After taxation, the amount of the account so taxed alone forms a charge against the client, and a decree on a charge of fifteen days may issue accordingly. The form of application is by petition,<sup>7</sup> and it is competent in all cases of accounts of expenses incurred in Court of Session proceedings,<sup>8</sup> but is incompetent in accounts of expenses of transactions as a factor,<sup>9</sup> or where employment is denied by the client.<sup>10</sup> Where an agent makes such an application, and the account is fairly and reasonably charged, he is entitled to the expenses of the petition.<sup>11</sup> If, however, one-fifth or more has been taxed off, the agent must pay the expenses of the taxation.<sup>12</sup> Again, if the client makes no unnecessary opposition, the agent has been held not entitled to the expenses of the application except those of extracting decree.<sup>13</sup> The general rule, however, is that expenses of the application are awarded except in special circumstances.<sup>14</sup> The agent, however, may rather choose to raise a summons for payment, in which case the Lord Ordinary will remit to the Auditor of Court to tax and report, and no decree, whether in absence or after hearing parties, can be given without first having such a report.<sup>15</sup>

<sup>1</sup> *Webster v. M'Lellan*, 1852, 14 D. 932.

<sup>2</sup> *Cuthbertson v. Elliot*, 1860, 22 D. 389.

<sup>3</sup> *Ireland v. Wilson*, 1851, 13 D. 1226.

<sup>4</sup> C.A.S., K, iv. (Court of Session); C.A.S., M, ii. (Inferior Courts); A.S., 20th July 1920, and subsequent Acts extending same.

<sup>5</sup> *Wallace v. M'Kissock*, 1829, 7 S. 542.

<sup>6</sup> C.A.S., K, i. 2.

<sup>7</sup> *Cullen v. Campbell*, 1829, 8 S. 197; *Gowan, Petr.*, 1835, 13 S. 491.

<sup>8</sup> *Jameson v. Wight*, 1829, 7 S. 379.

<sup>9</sup> *Howison v. Stewart*, 1832, 10 S. 630.

<sup>10</sup> *Adam v. Aitken*, 1832, 11 S. 196; but see *Brodie v. M'Farlane's Tr.*, 1845, 8 D. 32.

<sup>11</sup> *Roy v. Paton*, 1835, 13 S. 1081; *Duncan v. Poynter*, 1839, 2 D. 164.

<sup>12</sup> *Meiklejohn v. Moncrieff*, 1850, 13 D. 303.

<sup>13</sup> *Brown, Petr.*, 1831, 10 S. 45.

<sup>14</sup> *Roy v. Paton*, *supra*; *Duncan v. Poynter*, *supra*; *Sprott v. Clerk*, 1854, 16 D. 1043.

<sup>15</sup> C.A.S., K, i. 2 (c).

**1322.** In an agent's account against his own client, cash advances are to be distinguished from professional charges in the matter of interest. Interest is due upon the former from the date of advance, provided that they are of the kind of advance usually put in a cash account. "Ordinary judicial expenses paid out by an agent,<sup>1</sup> outlays for printing,<sup>2</sup> and similar payments are not considered cash advances coming within the rule. All other outlays, however, made by an agent, such as advances incurred for the repair of property, payments for premiums of assurance, payments of debts due, counsel's and accountant's fees, stamps, and such like, are advances on which the agent can claim interest, just as a banker can do on advances he makes."<sup>3</sup> Professional charges are in a totally different position, and "no interest ought to be allowed on such claims on open account except where there is a judicial demand or some such intimation given in writing, as that interest will be claimed from the date of demand."<sup>4</sup> Where an interlocutor of the Lord Ordinary awarding a sum of money and expenses has been reclaimed to the Inner House and affirmed, it is not the practice of the Court to make an award of interest from the date of the Lord Ordinary's interlocutor, nor will the Court, in applying the judgment of the House of Lords, make an award of interest from the date of the Lord Ordinary's judgment in favour of the pursuer, where that judgment has been recalled by the Inner House and restored by the House of Lords.<sup>5</sup> An agent must credit his client with any discount or commission he may receive from any person employed by him on behalf of his client.<sup>6</sup>

#### SUBSECTION (13).—*Agent-Disburser.*<sup>7</sup>

##### (i) *Generally.*

**1323.** The principle upon which an agent-disburser's right to obtain decree for expenses rests is that he is the assignee of his client.<sup>8</sup> This principle would of itself be insufficient to safeguard the agent from claims of compensation put forward by the opposite party to the action, and so the principle of expediency is called in to support the agent's right to recover expenses which he has disbursed.<sup>9</sup> "The privilege of obtaining decree in the name of the agent-disburser is truly based on this, that it was by the agent's exertions that the fund in question, so to speak, has been brought into practical existence, and that it would be hard upon the agent who had necessarily incurred expense

<sup>1</sup> *Macpherson v. Tytler*, 1853, 15 D. 706.

<sup>2</sup> *Barclay v. Barclay*, 1850, 22 Sc. Jur. 354.

<sup>3</sup> *Blair's Trs. v. Payne*, 1884, 12 R. 104, per Lord Fraser; *Somervell's Trs. v. Edinburgh Life Assurance Co.*, 1911 S.C. 1069.

<sup>4</sup> Lord Fraser, in *Blair's Trs.*, *supra*.

<sup>5</sup> *Roger v. Cochrane & Co.*, 1910 S.C. 1.

<sup>6</sup> *Ronaldson v. Drummond & Reid*, 1881, 8 R. 956.

<sup>7</sup> *Gordon v. Davidson*, 1865, 3 M. 938.

<sup>8</sup> Bell, Com. ii. 36.

<sup>9</sup> Maclaren, p. 256.

in order to do so if that fund were carried away in reference to old debts, etc.”<sup>1</sup>

**1324.** There is an exception to the general rule in favour of the agent-disburser where the pursuer and defender are each in the same cause given different awards of expenses. In these circumstances the one set of expenses may be set off against the other,<sup>2</sup> and the exception applies even though these awards are made at different periods of the cause.<sup>3</sup> It would be different, however, where the first award given in a case has been obtained in name of the agent-disburser; in that event a later award would not be set against the first.<sup>4</sup> In an action in which two sums were sued for on different grounds of liability and the pursuer obtained decree for one of the sums only, the defender being awarded modified expenses, a motion for the defender's expenses in name of the agent-disburser was refused.<sup>5</sup> Where there is only a possibility of a counter award of expenses emerging later on in the same cause, this will not prevent a decree for expenses already awarded from being given in the name of the agent-disburser.<sup>6</sup> The exception to the general rule in favour of the agent-disburser has been extended to the case where there are two actions which might have been conjoined as arising out of the same matter.<sup>7</sup> If, however, the two actions, though arising between the same parties, are quite separate and distinct, there may be decree in the name of the agent-disburser.<sup>8</sup> Again, if two actions arise between the same parties out of the same subject-matter, and a decree in the earlier action has been extracted and has become a judgment debt, decree in the name of the agent-disburser in the later cause will be granted.<sup>9</sup>

**1325.** Where a wife was given her expenses in an action for custody of a child, in which the husband's case, though originally premature, was ultimately successful, her agent was held not entitled to obtain decree in his own name as agent-disburser, in respect that the wife had disregarded the order of the Court, and left the country taking the child with her.<sup>10</sup> A party is not entitled to insist upon delivery of a decree of absolvitor, where expenses have been given in name of the opposite agent as agent-disburser, in return for payment of these

<sup>1</sup> *Lockgelly Iron and Coal Co., Ltd. v. Sinclair*, 1907 S.C. 442, per Lord Pres. Dunedin.

<sup>2</sup> *Stothart v. Johnston's Trs.*, 1822, 2 Mur. 549; *Warburton v. Hamilton*, 1826, 4 S. 639.

<sup>3</sup> *Graham v. M'Arthur*, 1826, 5 S. 46; *Gordon v. Davidson*, 1865, 3 M. 938; *Macgillivray v. Mackintosh*, 1891, 19 R. 103, per Lord Adam; *Dixon v. Murray*, 1894 (O.H.), 1 S.L.T. 600; *Grieve's Trs. v. Grieve*, 1907 S.C. 963.

<sup>4</sup> *Blasquez v. Scott*, 1893, 1 S.L.T. 357.

<sup>5</sup> *Masco Cabinet Co. v. Martin*, 1912 S.C. 896.

<sup>6</sup> *Hugh Nelson & Co. v. Glasgow Corporation*, 1908 S.C. 879.

<sup>7</sup> *Portobello Pier Co. v. Clift*, 1877, 4 R. 685; *Oliver v. Wilkie*, 1901, 4 F. 362; *Lockgelly Iron and Coal Co. v. Sinclair*, *supra*.

<sup>8</sup> *Paterson v. Wilson*, 1883, 11 R. 358; *Stuart v. Moss*, 1886, 13 R. 572; *Strain v. Strain*, 1890, 17 R. 566; *Bruce v. Adamson*, 1900 (O.H.), 8 S.L.T. 17; *Levy v. Blasquez*, 1908 (O.H.), 16 S.L.T. 6; *Fine v. Edinburgh Life Assurance Co.*, 1909 S.C. 636.

<sup>9</sup> *Paolo v. Parias*, 1897, 24 R. 1030; *Fine v. Edinburgh Life Assurance Co.*, *supra*; *Wm. Baird & Co. v. M'Bride*, 1928 S.N. 31.

<sup>10</sup> *Bloe v. Bloe*, 1882, 9 R. 894.



expenses.<sup>1</sup> The name of the Sheriff Court agent-disburser may be inserted in the decree if the Court of Session agent consents and there is no opposition.<sup>2</sup> Where the party found entitled to expenses dies before the account is audited, the agent is not entitled to decree in his own name until the representatives of the deceased have been sisted.<sup>3</sup>

(ii) *Right of Agent to be Sisted.*

**1326.** An agent's right to take up an action in order to recover expenses is admitted only (1) when his client has obtained a decree for expenses; (2) when there has been judgment necessarily leading up to such a decree; or (3) where there has been collusion between the parties in order to defeat his claim. These propositions were originally laid down in *M'Lean v. Auchenvole*.<sup>4</sup> In the later cases of *Murray v. Kyd*,<sup>5</sup> and *Macqueen v. Hay*,<sup>6</sup> the views expressed in the earlier case were gone back on, but the law was again considered in *Cornwall v. Walker*,<sup>7</sup> which was a considered judgment to the effect that the Court would abide by the older case. In *Ammon v. Tod*,<sup>8</sup> *M'Lean v. Auchenvole* and *Cornwall v. Walker* were expressly followed. In one case an offer was made on record of £50 and expenses, which, however, was withdrawn, and the parties themselves settled for £20, without expenses. It was held that there was no evidence of collusion, and the application of the agent to be sisted was refused.<sup>9</sup> In a subsequent case, however, the pursuer was an old woman, so weak that she could not sign her name, and a minute settling the case was executed by a notary, who was a relative of the defender. This minute was recalled by a minute of the pursuer and her law agent, which was superseded by a third minute signed notarially and behind the agent's back. In these special circumstances the law agent was found entitled to be sisted.<sup>10</sup> Motions to sist agents not infrequently occur in consistorial cases, usually where a wife after initiating a litigation becomes reconciled to her husband. Sometimes the agent is allowed to be sisted,<sup>11</sup> sometimes not.<sup>12</sup> The Court, as a rule, will not entertain the agent's claim in the original action if the case is settled before there has been any investigation into the facts.<sup>13</sup>

<sup>1</sup> *Williams v. Carmichael*, 1874, 11 S.L.R. 530.

<sup>2</sup> *Smith v. Gordon*, 1908, 45 S.L.R. 513; *Cassels v. Filshie*, 1926, S.L.T. 497.

<sup>3</sup> *Baillie*, 1872, 10 M. 414.

<sup>4</sup> 3 S. 109.

<sup>5</sup> 1852, 14 D. 501.

<sup>6</sup> 1854, 17 D. 107.

<sup>7</sup> 1871, 8 S.L.R. 422.

<sup>8</sup> 1912 S.C. 306; see also *Crawford v. Smith* (O.H.), 1900, 8 S.L.T. 249.

<sup>9</sup> *Welsh v. Cousins*, 1898, 35 S.L.R. 656.

<sup>10</sup> *Crawford v. Smith*, *supra*.

<sup>11</sup> *Mitchell v. Stephen* (O.H.), 1913, 2 S.L.T. 367.

<sup>12</sup> *Wales v. Wales* (O.H.), 1902, 9 S.L.T. 371; *Smith v. Smith*, 1871, 9 M. 538.

<sup>13</sup> *Clark v. Henderson*, 1875, 2 R. 428; *Riddle v. Riddle* (O.H.), 1904, 12 S.L.T. 361; *Peek v. Peek*, 1926 S.C. 565.

(iii) *Charging Order.*

**1327.** A law agent may be found entitled to recover his account of expenses from any property which may be preserved or recovered on behalf of his client in any cause, and all acts or deeds of his client, after such a declaration has been obtained, except in favour of a *bona-fide* purchaser, are absolutely void and of no effect against such a declaration.<sup>1</sup> An agent is not entitled to a charging order where the property has been carried off by the prior sequestration of his client,<sup>2</sup> nor is he entitled to a charging order where his client has been successful in having a sum of money which had been lost through the fault of trustees replaced in a trust in which the client was only a *liferentrix*,<sup>3</sup> nor where beneficiaries were sisted along with trustees and successfully defended an action against the trust estate.<sup>4</sup> The law agents of a pursuer were held entitled to a charging order upon a sum agreed to be paid by the defenders in settlement of an action, in preference to creditors of the pursuer who had arrested the sum in the hands of the defenders on the dependence of an action brought by the creditors against the pursuer.<sup>5</sup> A charging order has been granted to the pursuer's agents in a case where the pursuer as executrix-dative of her late husband sued the law agents in the executry for an accounting, and recovered a large sum;<sup>6</sup> and also where a pursuer sued his father's testamentary trustees for an accounting in which a debit balance was changed into a credit balance.<sup>7</sup> The Glasgow agents of a pursuer who was successful in an action in the Court of Session, and whose expenses were taxed as between agent and client, were granted a charging order upon the sum recovered, in respect of their expenses of appearing in the Court of Session as Glasgow agents.<sup>8</sup> Where a law agent conducted a litigation on behalf of a foreign syndicate he was held entitled to a charging order on the fund recovered by his clients, notwithstanding that the decree in the action had been extracted, that the syndicate had gone into voluntary liquidation, and that the fund sought to be charged had been paid over to the liquidator.<sup>9</sup>

SUBSECTION (14).—*Litigant in Forma Pauperis.*

**1328.** The poor's roll is regulated by Act of Sederunt.<sup>10</sup> By s. 15 of said Act the expense of the application and the procedure thereon

<sup>1</sup> 54 & 55 Vict. c. 30, s. 6.

<sup>2</sup> *Tait & Co. v. Wallace*, 1894, 2 S.L.T. 261.

<sup>3</sup> *Carruthers' Tr. v. Finlay & Wilson*, 1897, 24 R. 363.

<sup>4</sup> *Hutchison v. Hutchison's Trs.*, 1902, 40 S.L.R. 200.

<sup>5</sup> *The Automobile Gas Producer Syndicate, Ltd. v. The Caledonian Rly. Co.*, 1909, 1 S.L.T. 499.

<sup>6</sup> *Stenhouse v. Stenhouse's Trs.*, 1903, 10 S.L.T. 684.

<sup>7</sup> *Paton v. Paton's Trs.*, 1905, 13 S.L.T. 96.

<sup>8</sup> *Bannatyne, Kirkwood & Co.*, 1907 S.C. 705.

<sup>9</sup> *Philip v. Wilson*, 1911 S.C. 1203.

<sup>10</sup> C.A.S., A, x.

for admission to the poor's roll shall at no future period form any charge at the instance of the agent against the pauper, except to the extent of the actual outlay of the agent, nor shall the said expenses of admission form any part of the "expenses of process" which may be found due against the adverse party in the principal cause; reserving to the Inner House, at the time of the admission, if there shall happen to have been unreasonable or vexatious opposition to the applicant's admission, to dispose of the matter of expenses thereby occasioned as to their Lordships shall seem proper. Sec. 16 declares that persons pursuing or defending *in forma pauperis* shall in the first instance be exempted from the payment of fees and professional charges to counsel and agents and of Court fees; but where such persons are found entitled to expenses, such fees and professional charges and Court fees, including all dues of extract issued or to be issued, shall be included in the account for expenses and decerned for; and on the said expenses being recovered, the amount thereof shall be accounted for to the several parties interested.

**1329.** Sec. 17 enacts, with regard to accounts of expenses, that from and after the passing of this Act, the agent, in making out the same, shall make an abstract at the end thereof, stating the amount: "1st. Of his own professional charges; 2nd. Fees to counsel and clerks; 3rd. Fee fund dues; 4th. Printing or other outlay"; and the Auditor of Court, on such account being presented for taxation, shall require the agent to furnish him with a copy of said abstract, and after taxation shall send same copy, marked as taxed, to the Clerk of Court to the process, whose duty it shall be thereupon to take steps to obtain payment in stamps of the Court fees so far as these have been recovered by the pauper or his agent from the opposite party in the cause.

**1330.** Though a party is on the poor's roll, he is still liable in expenses should he be unsuccessful.<sup>1</sup> If a party is put upon the poor's roll during the course of a cause, and is successful, an award of expenses against him in the case before he was put upon the poor's roll may be set against his decree for expenses, and the fact that the agent acting for him at the end is an agent for the poor does not alter matters.<sup>2</sup> Where both parties in a divorce case were on the poor's roll, and the husband, who was pursuer, abandoned his action, the wife was held entitled to her expenses, taxed as between party and party only, and then modified.<sup>3</sup> In this case the fee fund dues, which had been paid by the defender, were ordered by the Court to be repaid in terms of s. 5 of Act of Sederunt, 18th December 1896. As regards the Sheriff Court,<sup>4</sup> and the House of Lords,<sup>5</sup> see below.

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<sup>1</sup> *Powrie v. Powrie*, 1895, 2 S.L.T. 552.

<sup>2</sup> *Gordon v. Davidson*, 1865, 3 M. 938.

<sup>3</sup> *Kelly v. Kelly*, 1906, 14 S.L.T. 221.

<sup>4</sup> Para. 1339, *infra*.

<sup>5</sup> Para. 1338, *infra*.



## SECTION 8.—PARTICULAR COURTS.

SUBSECTION (1).—*Teind Court.*

**1331.** The business of the Teind Court is divided into two classes: <sup>1</sup> (1) Ministerial and discretionary actions, to be dealt with by the Teind Court; and (2) judicial actions, which may be dealt with by the Court of Session in one of its divisions. In the former cases, each party pays his own expenses; in the latter, expenses follow the event.

**1332.** Where in a process of locality a remit was made to the Teind Clerk to ascertain the practice upon certain points and to report, he was held entitled to remuneration from the parties to the locality.<sup>2</sup> Where an interim scheme of locality was approved of, the common agent was held entitled to decree for his expenses up to that date, and was not bound to await the decision of the final locality.<sup>3</sup> A common agent who did not consult his heritors, and resisted objections to a locality, was held not personally liable in expenses.<sup>4</sup>

SUBSECTION (2).—*Exchequer Court.*<sup>5</sup>

**1333.** It is competent to grant expenses to and against the Crown in this Court.<sup>6</sup>

SUBSECTION (3).—*Exchequer Appeal Court.*<sup>7</sup>

**1334.** Expenses may be awarded in this Court,<sup>8</sup> but not against the Crown in remits from the Quarter Sessions,<sup>9</sup> unless a serious irregularity has been committed.<sup>10</sup>

SUBSECTION (4).—*Registration Appeal Court.*<sup>11</sup>

**1335.** Expenses may be awarded in this Court.<sup>12</sup> The usual custom is for the Court to award £3, 3s. of expenses when the Sheriff's judgment is affirmed, and no expenses when it is reversed.<sup>13</sup> If, however, it is reversed in the absence of the respondent, expenses modified to £3, 3s. are given to the appellant.<sup>14</sup>

SUBSECTION (5).—*Valuation Appeal Court.*<sup>15</sup>

**1336.** While expenses are not usually awarded in this Court, it was intimated from the Bench that if assessors continued to raise questions

<sup>1</sup> Maclaren, p. 385.<sup>2</sup> *Logan v. City of Edinburgh*, 1858, 20 D. 794.<sup>3</sup> *Mags. of Glasgow v. Hay*, 1871, 9 M. 520.<sup>4</sup> *Stewart v. Locality of Auchtergaven and Logiebride*, 1882, 19 S.L.R. 449.<sup>5</sup> Maclaren, p. 389.<sup>6</sup> Court of Exchequer Act, 1856, s. 24.<sup>7</sup> Maclaren, pp. 389 *et seq.*<sup>8</sup> *Dodsworth v. Rijnbergen*, 1886, 14 R. 238; *Massie v. Richardson*, 1900, 8 S.L.T. 238.<sup>9</sup> *The Queen v. Beattie*, 1866, 5 M. 191; *Wilson v. M'Intosh Bros.*, 1878, 5 R. 1097.<sup>10</sup> *Sumner v. Middleton*, 1878, 5 R. 863.<sup>11</sup> Maclaren, p. 391.<sup>12</sup> *Niven v. Stewart*, 1908 S.C. 290; *Urquhart v. Adam*, 1904, 7 F. 157.<sup>13</sup> *Brown v. Ingram*, 1868, 7 M. 281.<sup>14</sup> *Babbie v. Lindsay*, 1866, 5 M. 72.<sup>15</sup> Maclaren, p. 392.

in the face of express and repeated decisions, it would be matter for consideration whether expenses should not be awarded against them.<sup>1</sup> Though there is no express authority in the Valuation Statutes enabling judges to award expenses, it is thought that they have power to do so.

#### SUBSECTION (6).—*Justiciary Appeal Court.*<sup>2</sup>

**1337.** No expenses are awarded in the High Court except when it is sitting as a Court of review.<sup>3</sup> In stated cases the High Court has power to award such expenses, both in the High and inferior Courts, as they may think fit.<sup>4</sup> Full expenses have been given in both Courts,<sup>5</sup> and in the High Court,<sup>6</sup> but expenses are usually modified.<sup>7</sup> In suspensions expenses are usually modified.<sup>8</sup> Where the prosecutor consents to a conviction being set aside, the expenses are £3, 3s.<sup>9</sup> In small debt appeals the account of expenses is usually remitted for taxation and report.<sup>10</sup> By statute<sup>11</sup> if the amount of the expenses found due has not been determined or modified, the account is remitted to the Auditor of the Court of Session, to be taxed in the like manner and subject to the same regulations as accounts of expenses in actions in the Court of Session.<sup>12</sup> A session fee is not a proper charge.<sup>12</sup>

#### SUBSECTION (7).—*House of Lords.*<sup>13</sup>

**1338.** By Standing Order IV., applicable to appeals under the Appellate Jurisdiction Act, 1876,<sup>14</sup> security for costs must be given by the appellant to the amount of £500 by recognisance and £200 by bond. Appeals on the question of expenses alone are incompetent.<sup>15</sup> The rules of expenses are similar to those of the Court of Session. In pauper causes, however, the rule of the Court of Session awarding expenses to a successful pauper is not followed. The House of Lords only allows such expenses as have been incurred by the pauper appellant in appearing *in forma pauperis* as certified by the Clerk of the Parliaments.<sup>16</sup> The latter disallows the fees of the House of Lords and fees of counsel, and only allows the solicitor the costs out of pocket, with a

<sup>1</sup> *Forbes Irvine v. Aberdeenshire Assessor*, 1893, 20 R. 626, at p. 628.

<sup>2</sup> *Maclaren*, p. 393.

<sup>3</sup> *H.M. Advocate v. Aldred*, 1922 J.C. 13.

<sup>4</sup> Summary Jurisdiction (Scotland) Act, 1908, s. 72.

<sup>5</sup> *Walker v. Linton*, 1892, 3 White 329; 20 R. (J.) 1.

<sup>6</sup> *Brown v. Neilson*, 1906, 5 Adam 149; 1907 S.C. (J.) 3; *Steuart v. Macpherson*, 1918 J.C. 96.

<sup>7</sup> *M'Intyre v. Linton*, 1876, 3 Couper 319; *Maclaren*, p. 394; *Moncreiff on Criminal Review*, pp. 183-6.

<sup>8</sup> *M'Intyre v. Linton*, *supra*.

<sup>9</sup> Sec. 73, Summary Jurisdiction Act, 1908.

<sup>10</sup> *Allison v. Balmain*, 1882, 10 R. (J.C.) 12.

<sup>11</sup> 58 & 59 Vict. c. 14, s. 3.

<sup>12</sup> *Rochiciolli v. Walker*, 1916 S.C. (J.) 18.

<sup>13</sup> *Maclaren*, pp. 127 *et seq.*

<sup>14</sup> 39 & 40 Vict. c. 59.

<sup>15</sup> *Barrie v. Caledonian Rly. Co.*, 1903, 5 F. (H.L.) 10.

<sup>16</sup> *Mackie v. Gloag's Trs.*, 1884, 11 R. (H.L.) 10; *M'Alinden v. James Nimmo & Co.*, 1919 S.C. (H.L.) 84.

reasonable allowance to cover office expenses, including clerks, etc. This allowance is taken to be three-eighths of the solicitor's charges in "Dives" appeals, other than out-of-pocket costs. When the House of Lords reverses a judgment without a finding as to expenses, and remits to the Court of Session to proceed in the cause as shall be just, the Court decides the question of expenses in the lower Courts when the petition to apply judgment is made.<sup>1</sup> If, however, the House of Lords exhaust the appeal without mention of expenses, and without such a remit, the Court of Session cannot award them.<sup>2</sup>

#### SUBSECTION (8).—*Sheriff Court.*<sup>3</sup>

**1339.** The general rules of expenses in the Court of Session are applicable to the Sheriff Court. There are, however, some points of procedure and practice which are peculiar to the Sheriff Court, and are regulated by the Sheriff Court Act, 1907,<sup>4</sup> and the relative Act of Sederunt,<sup>5</sup> where they are fully dealt with. Formerly expenses in the Sheriff Court had to be concluded for, but there is no provision in the new Act making this imperative. The old practice is generally continued *ob majorem cautelam*.

**1340.** Generally speaking, there are two scales of taxation in the Ordinary Sheriff Court—a higher and a lower—depending upon whether the sum concluded for is above or below £50.<sup>6</sup> If the amount cannot be ascertained by an examination of the process, the Sheriff may himself decide the scale of taxation.<sup>7</sup> In jury trials, mercantile sequestrations, cessio proceedings, and executry business, however, there is only one scale. It has been held that where cessio proceedings are stopped by tender and consignation of the debt before cessio has been awarded, the expenses to be charged must be on the lower scale.<sup>8</sup> In the ordinary Court the Sheriff determines the scale according to the sum concluded for,<sup>9</sup> but he may direct the taxation to proceed according to the sum decerned for, and he may also direct taxation in cases under £50 to be upon the higher scale. In actions of damages the general rule is that the scale is according to the sum decerned for, unless the Sheriff otherwise directs.<sup>10</sup> If the demand made does not exceed £20, small debt expenses only are allowed, and if the sum decerned for does not exceed £20, the Sheriff may give small debt expenses only.<sup>11</sup>

**1341.** In cases where an interlocutor has been pronounced allowing proof, and the case does not proceed to proof or trial, the Court of

<sup>1</sup> *Sawers' Exrs. v. Sawers' Trs.*, 1873, 11 M. 451.

<sup>2</sup> *North British Ry. Co. v. Tod*, 1847, 9 D. 1459.

<sup>3</sup> Lewis, *Sheriff Court Practice*, 7th ed., pp. 251 *et seq.*; Maclaren, pp. 399 *et seq.*, 412 *et seq.*

<sup>4</sup> 7 Edw. VII. c. 51.

<sup>5</sup> C.A.S., M, i.

<sup>6</sup> C.A.S., M, ii. 1.

<sup>7</sup> C.A.S., M, ii. 5.

<sup>8</sup> *Newby, Groves, and Meakin v. Robertson*, 1909, 25 S.C.R. 244.

<sup>9</sup> *M'Gorty v. Shotts Iron Co.*, 1910, 26 S.C.R. 157.

<sup>10</sup> *Morrison v. M'Master*, 1911, 27 S.C.R. 156.

<sup>11</sup> A.S., 10th April 1908, s. 2.



Session regulation allowing against the opposite side the expenses of precognitions made prior to the raising of the action or the preparation of defences is extended to plans, analyses, reports, and the like, and these latter and the precognitions may be charged for in the Sheriff Court down to the allowance of proof. Upon this regulation it has been held that where, after an allowance of proof, an amendment gave to a simple case an entirely different complexion, but the amended case was not remitted to probation, a party was entitled to the expenses of the precognitions only for the original case.<sup>1</sup> The Sheriff has power to disallow charges for papers or particular procedure or agency which he may deem irregular or unnecessary, and he has power to modify expenses. In cases of great importance or requiring special preparation, the Sheriff may allow a debate fee not exceeding £7, 7s., and this fee the agent may charge against his own client. The Act of Sederunt<sup>2</sup> with regard to amendments does not apply to Sheriff Court cases appealed to the Court of Session.<sup>3</sup> In cases arising in the Sheriff Court and appealed to the Court of Session for jury trial where the amount of the verdict is less than £50 the rule imposed by the Act of Sederunt in regard to jury trials in the Court of Session applies, but only in respect of expenses incurred in the Court of Session itself.<sup>4</sup> The expense of counsel in the Sheriff Court is only allowed when authorised or sanctioned by the Court.<sup>5</sup> The dues of the Sheriff Court<sup>6</sup> and the fees of sheriff officers<sup>7</sup> are regulated by Act of Sederunt.

**1342.** In the Small Debt Court there is only one scale of taxation. When a case is remitted from the Small Debt to the ordinary Court the fees thereafter chargeable are according to Scale I. of the ordinary Court expenses.<sup>8</sup> In ordinary removings and ejections the scale of expenses is determined by the amount of the rent per annum. Where the rent is not set forth as exceeding £50, the charges are according to Scale I.<sup>9</sup>

**1343.** Objections to the Auditor's report in the Sheriff Court must be lodged within forty-eight hours of the account being taxed.<sup>10</sup> These objections should be stated specifically. Where an action is raised in the Court of Session, which should have been raised in the Sheriff Court, it is competent for the Lord Ordinary to order the expenses of the successful party to be taxed on the Sheriff Court scale.<sup>11</sup> The

<sup>1</sup> *Buchanan v. French & Watson, Ltd.*, 1910, 26 S.C.R. 246.

<sup>2</sup> C.A.S., B, i.

<sup>3</sup> *Paterson v. Wallace*, 1909 S.C. 20.

<sup>4</sup> C.A.S., F, iii. 3; *Geddes v. M'Lellan*, 1908 S.C. 941; *Hughes v. Allens*, 1909 S.C. 1210.

<sup>5</sup> C.A.S., M, ii.; Table of Fees, i. 16; *Garden, Haig-Scott & Wallace v. Prudential Approved Society for Women (O.H.)*, 1927, S.L.T. 393.

<sup>6</sup> Act of Sederunt, 22nd February 1922, amended as to Workmen's Compensation Cases, 21st December 1923.

<sup>7</sup> C.A.S., M, iii. as amended by Act of Sederunt, 22nd October 1919.

<sup>8</sup> Sheriff Courts (Scotland) Act, 1907, Rule 166.

<sup>9</sup> Rule 167; C.A.S., M, ii. 14.

<sup>10</sup> Rule 168.

<sup>11</sup> C.A.S., M, ii. 7.

expenses of trial by Sheriff and jury under the Lands Clauses Act, 1845, fall to be taxed by the Auditor of the Sheriff Court.<sup>1</sup>

**1344.** Unless expenses are awarded against and recovered from the opposite party, a poor agent has no claim for fees; but the litigant is liable to him for actual outlays incurred with the litigant's sanction.<sup>2</sup> The agent is not liable for witnesses' fees, shorthand writers' fees, or Court dues, unless they are recovered by the agent personally.<sup>3</sup> Neither the agent nor the litigant is liable for dues of Court or officers' fees unless these are awarded against and recovered from the opposite party, in which case the litigant (or the agent, if he personally recovers the same) is liable.<sup>4</sup>

## SECTION 9.—TAXATION.

### SUBSECTION (1).—*Generally.*

**1345.** Taxation is the proceeding by which accounts are submitted to a skilled person to examine, consider, and tax. Taxation may always be ordered either between litigants or between the client and his agent, though in either case the party called upon to pay may waive his claim to taxation. Expenses are taxed either as between party and party, as between agent and client, or on an intermediate scale, which is sometimes called taxation as between agent and client, third party paying. An interlocutor awarding expenses without qualification implies expenses taxed as between party and party.<sup>5</sup> The question of the method of taxation should be settled when expenses are awarded; and it is too late to raise such questions as taxation between agent and client, personal liability, joint and several liability, modification, apportionment, separate sets of defences, etc., on the motion for approval of the Auditor's report.<sup>6</sup> The preparation and taxation of all accounts for judicial proceedings, whether as between party and party, or as between agent and client, are regulated by the Codifying Act of Sederunt, K, iv.

### SUBSECTION (2).—*Modes of Taxation.*

**1346.** Taxation as between party and party includes only such expenses of the cause "as are absolutely necessary for conducting it in a proper manner, with due regard to economy."<sup>7</sup> By the second method

<sup>1</sup> C.A.S., M, ii. 4.

<sup>2</sup> Sheriff Courts (Scotland) Act, 1907, Sched. I. Rule 100.

<sup>3</sup> *Murray v. Steel & Sons*, 1885, 12 R. 945; *M'Farlane v. Lewis*, 1858, 21 D. 107; *Wilkie v. Alloa Rly. Co.*, 1884, 12 R. 219, per Lord Young.

<sup>4</sup> *Deas on Railways* (Ferg. edit.), 383.

<sup>5</sup> *Fletcher's Trs. v. Fletcher*, 1888, 15 R. 862; *Mags. of Aberchirder v. Banff District Council*, 1906, 8 F. 571; *M'Gregor's Trs. v. Kimbell*, 1912 S.C. 261.

<sup>6</sup> *Allan's Trs. v. Allan & Son*, 1891, 19 R. 15; *Murray v. Macfarlane's Trs.*, 1895, 23 R. 80; *Mackellar v. Mackellar*, 1898, 25 R. 883; *S.S. "Fulwood," Ltd. v. Dumfries Harbour Commrs.*, 1907 S.C. 456, 735; 14 S.L.T. 680; *Warrand v. Watson*, 1907 S.C. 432.

<sup>7</sup> C.A.S., K, iv. App. ii. No. 4.

of taxation, as between agent and client, "the client is liable for all expenses reasonably incurred by the agent for the protection of his client's interest in the suit, even though such expenses cannot be recovered from the opposite party.<sup>1</sup> By the third method of taxation the principle of taxation is not necessarily the same as where the client has to pay his agent, and the Auditor is entitled to knock off needless and excessive charges which might be allowed as against the client.<sup>2</sup> This is the principle adopted in consistorial actions.<sup>3</sup> The expenses allowed to be charged against the opposite party are limited to proper expenses of process, without any allowance for preliminary investigations, subject to the proviso that precognitions may be allowed where eventually an interlocutor is pronounced either approving of issues or allowing a proof.<sup>4</sup>

**1347.** A client is always entitled to have his agent's account taxed,<sup>5</sup> and the right can only be foreclosed by express waiver.<sup>6</sup> This right of taxation is competent to any person interested in the account.<sup>7</sup> The waiver of a client's right to have business accounts taxed must appear in explicit terms before it can be pleaded against him by the agent; and the law is extremely jealous of any settlements of accounts between an agent and his client, as the parties do not meet upon equal terms.<sup>8</sup>

#### SUBSECTION (3).—*Remit to Auditor.*<sup>9</sup>

**1348.** The taxation of accounts is left entirely in the hands of the Auditor, and it is only in very exceptional circumstances that the Court will interfere with his discretion;<sup>10</sup> he has, however, no power to refuse the expense of proceedings which have been ordered by the Court.<sup>11</sup> To him the clerk transmits the process, and the agent gives in the account of expenses. Of this account he serves a copy on the opposite agent, along with a warrant for parties to appear on a fixed day for the purpose of having the account taxed. The Auditor may hear the agents for the parties, and may call for vouchers of all the articles stated in the account.

**1349.** If either party intends to object to the Auditor's report, he must "immediately lodge with the clerk a note of his objections,

<sup>1</sup> Mackay, Practice, ii. 585.

<sup>2</sup> *Walker v. Trades House of Glasgow*, 1869, 7 M. 751; *Hood v. Gordon*, 1896, 23 R. 675.

<sup>3</sup> *King v. King*, 1845, 7 D. 536; *Stair v. Stair*, 1905, 13 S.L.T. 446; *M'Caw v. M'Caw*, 1907, 15 S.L.T. 392; *Petrie v. Petrie*, 1911, 1 S.L.T. 410.

<sup>4</sup> C.A.S., K, iv. App. ii. No. 3.

<sup>5</sup> *Henderson v. Jackson*, 1852, 14 D. 1040.

<sup>6</sup> *M'Laren v. Manson*, 1857, 20 D. 218.

<sup>7</sup> *M'Farlane v. M'Farlane's Trs.*, 1897, 24 R. 574; *Macdonald v. Macdonald*, 1856, 18 D. 630.

<sup>8</sup> *M'Laren v. Manson*, *supra*, per Lord Deas.

<sup>9</sup> Maclaren, pp. 422 *et seq.*

<sup>10</sup> *Tough's Trs. v. Dumbarton Water Commrs.*, 1874, 1 R. 879; *Tannett, Walker & Co. v. Hannay & Son*, 1874, 1 R. 440; *Ovens & Sons v. Bo'ness Coal Gas Light Co.*, 1891, 28 S.L.R. 255; *Shaw & Shaw v. J. & T. Boyd, Ltd.*, 1907 S.C. 646.

<sup>11</sup> *Stott v. M'William*, 1856, 18 D. 716.



stating them shortly and without entering into argument; a copy of which note shall be transmitted by him to the agent on the other side; and the Court, or the Lord Ordinary, may either direct the same to be answered in writing or *viva voce* at the bar, as the case may require, the expense of such discussion being always laid upon the objector, in case his objection shall not be sustained.”<sup>1</sup> All objections to the Auditor’s report must be lodged within forty-eight hours after the report has been issued, unless special cause is shewn.<sup>2</sup> Where objections are taken and repelled, it is imperative to award the expenses of the discussion immediately thereafter against the unsuccessful objector.<sup>3</sup> If the objections are partially successful the expenses against the objector may be modified.<sup>4</sup> If the Auditor reports a point for the consideration of the Court, the Court has a discretion and usually awards expenses to neither party.<sup>5</sup>

**1350.** On the taxation of the account of a party who has been found entitled to expenses generally, it is the duty of the Auditor to tax in terms of the existing table of fees prepared in pursuance of the Act of Sederunt.<sup>6</sup> By the Act he is given power to consider whether there is any part of the case in which the successful party has been unsuccessful, and also to consider whether any part of the proceedings has been caused by his own fault, and in either case to disallow the expense.<sup>7</sup> The clause in the Codifying Act of Sederunt dealing with this matter is expressed thus: “Notwithstanding that a party shall be entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part, or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.” What is signified by the word “fault” in the above clause is open to conjecture; it has been held that it does not mean that the party has stated a plea which he ought not to have stated, so as to entitle the Auditor to determine whether the particular plea ought or ought not to have been stated.<sup>8</sup> Where the defenders objected to the Auditor’s report on the ground that the Auditor should have disallowed the expenses of a proof, the Court held that the objection was stated too

<sup>1</sup> C.A.S., K, i. 2.

<sup>2</sup> *Maclaren*, p. 427; *Stewart & Co. v. Johnstone*, 1893, 20 R. 832; *A.B. v. C.D.*, 1894, 21 R. 1083; *Cory v. Smith*, 1894, 2 S.L.T. 184; *Murdison v. Scottish Football Union*, 1896, 3 S.L.T. 301; *Hutchison v. Galloway Engineering Co.*, 1922 S.C. 497.

<sup>3</sup> *Maclaren*, p. 427; *Matthew v. Ballingall*, 1844, 6 D. 1135.

<sup>4</sup> *Treacher v. Galloway*, 1845, 7 D. 1099.

<sup>5</sup> *Maclaren*, p. 428; *Nisbet v. Dixon & Co.*, 1853, 15 D. 778.

<sup>6</sup> *Maclaren*, p. 429.

<sup>7</sup> C.A.S., K, iv. App. ii. No. 5; *M’Elroy & Sons v. Tharsis Sulphur and Copper Co.*, 1879, 6 R. 1119; *Rigby and Beardmore v. Downie*, 1872, 9 S.L.R. 627; *Strang v. Brown & Son*, 1882, 19 S.L.R. 890; *Arthur v. Lindsay*, 1895, 22 R. 904; *Craig v. Craig*, 1906, 44 S.L.R. 100; 14 S.L.T. 469; *Kelvin v. Whyte, Thomson & Co.*, 1909, 1 S.L.T. 477; *Maclaren*, p. 445.

<sup>8</sup> *Welsh v. Russell*, 1894, 21 R. 769; *Lauderdale, v. Wedderburn* 1910, 2 S.L.T. 209.

late.<sup>1</sup> It is the duty of the Auditor, where the Court has awarded expenses subject to modification, to tax as if the finding had been general, and to leave it to the Court to fix the modification subsequently.<sup>2</sup> Where the expenses of preliminary or incidental procedure have been reserved and subsequently the Court has given a general award of expenses, the Auditor has no power to interfere, and the general finding carries the reserved expenses.<sup>3</sup> Nor has the Auditor any discretion in regard to "expenses in the cause" which must go to the party ultimately successful.<sup>4</sup>

**1351.** The unsuccessful party, as a general rule, pays the expense of taxation, but if the amount struck off is excessive, the expense may be laid on the party entitled to the account,<sup>5</sup> or the expense may be divided between the parties.<sup>6</sup> The general practice has been to allow the expense of taxation unless one-fifth or more has been taxed off.<sup>7</sup>

**1352.** After taxation it is necessary for the successful litigant to move the Court for the approval of the Auditor's report. The successful party is entitled to the expense of this motion, unless the unsuccessful litigant makes a proper tender of the whole amount of the taxed expenses.<sup>8</sup> The tender must be received prior to the enrolment for approval.<sup>9</sup> When the motion for approval is enrolled, the enrolment should state whether there are objections to it, or reservations by the Auditor, or whether the expenses fall to be modified;<sup>10</sup> all objections should be stated at one time.<sup>11</sup> Where there are objections to the Auditor's report, it is competent to reclaim against the Lord Ordinary's interlocutor approving it.<sup>12</sup>

## SECTION 10.—FEES TO COUNSEL.

### SUBSECTION (1).—Generally.

**1353.** Counsel are properly employed in regard to all important pleadings or steps of process.<sup>13</sup> A decision of the whole Court has settled the practice that a fee to counsel for advising an action to be raised cannot be allowed,<sup>14</sup> though a fee to counsel to advise whether

<sup>1</sup> *Electric Construction Co., Ltd. v. Hurry & Young*, 1897, 24 R. 525.

<sup>2</sup> *M'Elroy & Son v. Tharsis Sulphur and Copper Co.*, 1879, 6 R. 1119; *Strang v. Frown & Son*, 1882, 19 S.L.R. 890; *Wemyss's Trs. v. Hope*, 1903, 11 S.L.T. 187; *Maclaren*, p. 445.

<sup>3</sup> *Maclaren*, p. 446; see para. 1168, *supra*.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Maclaren*, p. 429.

<sup>6</sup> *Cameron v. Chapman*, 1835, 14 S. 24; *Hogg v. Balfour*, 1835, 13 S. 451.

<sup>7</sup> *Meiklejohn v. Moncrieff*, 1850, 13 D. 303; *Liddle v. Morrison*, 1897, 5 S.L.T. 12.

<sup>8</sup> *Newlands v. Gillanders*, 1905, 12 S.L.T. 825; *Bannatyne v. M'Lean*, 1884, 11 R. 681; *Maitland, Petr.*, 1882, 20 S.L.R. 35; *Mags. of Leith v. Gibb*, 1882, 19 S.L.R. 399; *Allan v. Allan's Trs.*, 1851, 13 D. 1270.

<sup>9</sup> *Campbell v. Campbell*, 1843, 5 D. 753.

<sup>10</sup> *Broadwood v. Hunter*, 1856, 18 D. 794; *Ratray v. Macpherson*, 1855, 17 D. 484.

<sup>11</sup> *King v. King*, 1845, 7 D. 536.

<sup>12</sup> *Cleugh v. Independent West Middlesex Assurance Co.*, 1841, 3 D. 884; *Stirling Maxwell's Trs. v. Mags. of Kirkintilloch*, 1883, 11 R. 1; *Innes v. Macdonald*, 1899, 1 F. 380.

<sup>13</sup> *Mackay, Manual*, p. 671; *Maclaren*, p. 447.

<sup>14</sup> *Douglas v. Marshall*, 1834, 12 S. 532.

an action should be defended has been passed,<sup>1</sup> as also a fee to counsel to advise whether several defenders should combine in one defence.<sup>2</sup> Fees to counsel are allowed for drawing summonses<sup>3</sup> (except in petitory actions or other small cases) or defences.<sup>4</sup> Though separate fees for consultation and debate are not usually allowed,<sup>5</sup> a consultation fee, in addition to a debate fee, will be allowed to counsel in important Inner House discussions.<sup>6</sup> Fees to counsel have been allowed for appearing at commissions<sup>7</sup> and at examinations of havers where questions of nicety have arisen,<sup>8</sup> though not in ordinary cases.<sup>9</sup> A fee to counsel to revise interrogatories has been allowed,<sup>10</sup> but not to revise a stated case under the Workmen's Compensation Act.<sup>11</sup> A fee sent to counsel to fix a date of trial when no date was fixed was disallowed.<sup>12</sup> Where an English solicitor's account was remitted to the taxing master to tax and report, counsel was allowed a fee for moving the remit and also for moving approval of the report.<sup>13</sup> A fee to English counsel giving evidence is allowed,<sup>14</sup> but not to English counsel to revise the record<sup>15</sup> or attend at examination of havers in London.<sup>16</sup>

#### SUBSECTION (2).—*Amount of Fees.*

**1354.** "The agent is, in the first instance, the best judge of what fees should be sent to counsel, and where he disburses a fee there is a strong probability that he has not sent more than is reasonable."<sup>17</sup> In a more recent case<sup>18</sup> Lord President Clyde observed, "Both the 'normal' fee in an ordinary case and the 'proper' fee in a big and difficult one, are just such fees as a practising law agent finds sufficient in order to command the services of competent counsel in cases of a similar character." These dicta must be taken in conjunction with observations made in another case<sup>19</sup> that counsel's fees must be considered, not necessarily with a view to the actual days for which they

<sup>1</sup> *Black v. Malcolm*, 1831, 9 S. 429.

<sup>2</sup> *Dunlop's Trs. v. Alexander's Trs.*, 1854, 16 D. 1104.

<sup>3</sup> Mackay, Manual, p. 671.

<sup>4</sup> *Gunn v. Muirhead*, 1899, 2 F. 10.

<sup>5</sup> *Lord Advocate v. Raynes, Lupton & Co.*, 1859, 21 D. 863.

<sup>6</sup> *Stewart v. Padwick*, 1873, 11 M. 467; *Earl of Kintore v. Pirie*, 1903, 11 S.L.T. 216.

<sup>7</sup> *Alison v. Blair Iron Co.*, 1856, 18 D. 851.

<sup>8</sup> *Gibb & M'Donald v. Baghott*, 1830, 2 Sc. Jur. 190; *Renton v. Hamilton*, 1846, 8 D. 1085.

<sup>9</sup> *Fairley v. M'Gown*, 1836, 14 S. 470.

<sup>10</sup> *Gibb & M'Donald v. Baghott*, *supra*; *Ellis v. Paton*, 1860, 22 D. 870.

<sup>11</sup> *London and Edinburgh Shipping Co. v. Brown*, 1905, 7 F. 488.

<sup>12</sup> *Campbell v. Ord & Maddison*, 1873, 1 R. 149.

<sup>13</sup> *Debenham v. Gillanders (O.H.)*, 1907, 15 S.L.T. 549.

<sup>14</sup> *Girvan, Roper & Co. v. Monteith*, 1895, 3 S.L.T. 192.

<sup>15</sup> *Duchess of Buckingham v. Winterbottom*, 1851, 13 D. 1347.

<sup>16</sup> *London Steam Colliery and Coal Co. v. Wingate & Co.*, 1868, 5 S.L.R. 657.

<sup>17</sup> Lord Pres. Inglis in *Tough's Trs. v. Dumbarton Water Commrs.*, 1874, 1 R. 879; see also Lord Trayner in *Rees v. Henderson*, 1902, 4 F. 813; and *Cooke v. Falconer*, 1851, 13 D. 843; *Patten's Trs. v. Campbell's Exrs.*, 1867, 3 S.L.R. 176.

<sup>18</sup> *Caledonian Rly. Co. v. Greenock Corporation*, 1922 S.C. 299.

<sup>19</sup> *Caledonian Rly. Co. v. Glenboig Union Fireclay Co.*, 1912 S.C. 511.



are allowed, but with a view to remuneration upon the case as a whole. Fees in proofs are, as a general rule, somewhat smaller than in jury trials.<sup>1</sup> Fees of twenty guineas and fifteen guineas for the first day to senior and junior counsel respectively, and fees in proportion for succeeding days have been given in the undernoted cases.<sup>2</sup> A fee of twenty-five guineas was given to senior counsel for the first day in *Rees v. Henderson*,<sup>3</sup> and a fee of ten guineas to junior counsel on the second day of a jury trial.<sup>4</sup> Fees of fifteen guineas and twelve guineas for senior and junior counsel for the first day of a proof have been allowed,<sup>5</sup> and where there was only one counsel, and the fees had not been previously sent, the Court upheld the Auditor's charge of twelve guineas for the first day of a proof and ten guineas for the succeeding days.<sup>6</sup> Fees of thirteen guineas and eight guineas were allowed to senior and junior counsel respectively where the jury trial occupied only part of a vacation day,<sup>7</sup> and the Court refused to allow more than the usual fees though the jury trial lasted from 10 a.m. until 6 p.m. on each of three days.<sup>8</sup> Where a case is compromised immediately before trial, counsel's fees are allowed.<sup>9</sup> In a number of cases much larger fees have been allowed. These cases usually involve large pecuniary interests or require a great amount of labour and technical knowledge on the part of counsel.<sup>10</sup>

### SUBSECTION (3).—*Refreshers.*

**1355.** It is a question of circumstances whether continuation fees are allowed in discussions in the procedure roll.<sup>11</sup> In the Inner House it has been held that the fact that a case extended over more than one day is no reason why an additional fee should be sent.<sup>12</sup> Continuation fees will only be allowed where a greater amount of time and trouble is required than fairly falls within the original fee.<sup>13</sup> Fees of

<sup>1</sup> *Wilson v. North British Rly. Co.*, 1873, 1 R. 304; *Tough's Trs. v. Dumbarton Water Commrs.*, 1874, 1 R. 879.

<sup>2</sup> Jury Trials—*Campbell v. Ord & Maddison*, 1873, 1 R. 149; *Mackie & Co. v. Gibb*, 1899, 2 F. 42; *Leonard v. Aitken*, 1907, 14 S.L.T. 810; Proofs—*Burrell & Son v. Russell & Co.*, 1900, 3 F. 12; *Dobell, Beckett & Co. v. Neilson*, 1905, 12 S.L.T. 747; *Mathieson v. Sorley*, 1906, 14 S.L.T. 70; *Reid v. Stewart*, 1906, 14 S.L.T. 221; *Shaw & Shaw v. J. & T. Boyd*, 1907 S.C. 646; 14 S.L.T. 880.

<sup>3</sup> 1902, 4 F. 813.

<sup>4</sup> *Campbell v. County Council of Peeblesshire*, 1893, 30 S.L.R. 252.

<sup>5</sup> *Wilson v. North British Rly. Co.*, 1873, 1 R. 304.

<sup>6</sup> *Tough's Trs. v. Dumbarton Water Commrs.*, *supra*.

<sup>7</sup> *Blair v. Caledonian Rly. Co.*, 1893, 21 R. 23.

<sup>8</sup> *Black v. Mason*, 1881, 8 R. 666.

<sup>9</sup> *Mathieson v. Sorley*, *supra*; *Crabbe & Robertson v. Stubbs, Ltd.*, 1896 (O.H.), 3 S.L.T. 235.

<sup>10</sup> Jury Trials—*Tannett, Walker & Co.*, 1874, 1 R. 440; *Rees v. Henderson*, 1902, 4 F. 813; *Duke of Buccleuch v. Cowan*, 1867, 5 M. 1054; *Neilson v. Barclay*, 1870, 8 M. 1011; Proofs—*Earl of Kintore v. Pirie*, 1903, 11 S.L.T. 216; *Goodwins, Jardine & Co. v. Brand & Son*, 1907 S.C. 965; 15 S.L.T. 117; *Coppack v. Miller* (O.H.), 1911, 2 S.L.T. 65; *Hurst, Nelson & Co. v. Spenser Whatley & Co.*, 1913 S.C. 101.

<sup>11</sup> *Lord Advocate v. Dunlop's Trs.*, 1894, 2 S.L.T. 375.

<sup>12</sup> *Davidson v. Scott*, 1915 S.C. 1120.

<sup>13</sup> *Leith Police Commrs. v. Campbell*, 1867, 5 M. 339; *Brady v. Watson*, 1881, 8 R. 694; *Baird & Stevenson v. Malloch*, 1892, 19 R. 1061.

eight guineas and four guineas to senior counsel and five guineas and three guineas to junior counsel were disallowed where they attended on the summar roll on Saturday morning, and again for an hour on Tuesday,<sup>1</sup> and a single fee was substituted therefor. Refreshers have been allowed where fees were sent to counsel in the expectation that the case would be reached before the end of the session, but was not reached until the following session.<sup>2</sup> Where, however, agents instructed senior and junior counsel for debate in the Outer House, and in consequence of the absence of senior counsel on the first day they sent fresh fees to both counsel, the latter fees were disallowed.<sup>3</sup>

#### SUBSECTION (4).—*Senior Counsel.*

**1356.** The fees of two counsel—senior and junior—have been allowed at the adjustment of the record.<sup>4</sup> Fees to senior counsel are allowed for difficult motions,<sup>5</sup> and for adjustments of issues<sup>6</sup> unless the adjustment is purely formal,<sup>7</sup> and for all debates in procedure and debate roll of the Outer House and summar and short roll of the Inner House.<sup>8</sup> Fees to senior and junior counsel are allowed at advisings,<sup>9</sup> and though the fees of only one counsel are usually allowed in ordinary discussions on expenses,<sup>10</sup> in an important discussion the fees of both senior and junior counsel were allowed.<sup>11</sup> In exceptional cases a fee may be allowed to senior counsel for revising a summons.<sup>12</sup> In a recent consistorial case whole-time fees were allowed to senior counsel.<sup>13</sup> No fee is allowed to senior counsel in a motion for a rule.<sup>14</sup> Fees have been allowed to two counsel for considering an extra-judicial offer.<sup>15</sup>

#### SUBSECTION (5).—*Third Counsel.*

**1357.** “The kind of cases in which the fees of three counsel are chargeable against the unsuccessful party are cases in which there may be a subdivision of labour, as in the case of a heavy trial by jury, where the labour of preparing may be divided among the counsel, and in many

<sup>1</sup> *Mackellar v. Mackellar*, 1898, 25 R. 883.

<sup>2</sup> *Mathieson v. Thomson*, 1853, 16 D. 106.

<sup>3</sup> *Treacher v. Galloway*, 1845, 7 D. 1099.

<sup>4</sup> *Stott v. M'William*, 1856, 18 D. 716; *Arthur v. Lindsay*, 1895, 22 R. 904; *Gunn v. Muirhead*, 1899, 2 F. 10.

<sup>5</sup> *Mackay, Manual*, p. 671.

<sup>6</sup> *Dunlop v. Lambert*, 1840, 2 D. 646; *Gardiner v. Black*, 1851, 13 D. 843.

<sup>7</sup> *Barrie v. Scottish Motor Traction Co.*, 1920 S.C. 704.

<sup>8</sup> *Mackay, Manual*, p. 671.

<sup>9</sup> *Lyell v. Mudie*, 1829, 8 S. 153; *Lord Advocate v. Raynes, Lupton & Co.*, 1859, 21 D. 863; *Leith Police Commrs. v. Campbell*, 1867, 5 M. 339; *M'Leod v. Leslie*, 1868, 5 S.L.R. 687.

<sup>10</sup> *Samuel v. Edinburgh and Glasgow Rly. Co.*, 1852, 14 D. 790.

<sup>11</sup> *Crawcour v. St. George Steam Packet Co.*, 1844, 6 D. 762.

<sup>12</sup> *Baillie v. Wilson*, 1917 S.C. 246.

<sup>13</sup> *Ovenstone v. Ovenstone (O.H.)*, 1922, S.L.T. 65.

<sup>14</sup> *M'Govern v. West Calder Co-operative Society*, 1914 S.C. 674.

<sup>15</sup> *Seath v. Cassel Cyanide Co. (O.H.)*, 1918, 2 S.L.T. 65.

other cases, such as the death-bed case between the parties in this case, where it is easy to see that there may be subdivision of labour.”<sup>1</sup> In the case mentioned the fees of three counsel were disallowed. In a case<sup>2</sup> in the same year, where a jury trial required technical knowledge on the part of counsel to decide large pecuniary interests, the Court allowed the fees of three counsel, and in a comparatively recent case the Court, in respect of its great length and complexity, found that the successful party was entitled to recover the fees of the three counsel employed.<sup>3</sup> In an exceptional consistorial cause where three counsel were employed in the Inner House, the fees of the two senior counsel were allowed, and the fees of the junior, who had been in the case throughout, were disallowed.<sup>4</sup> In an election petition, where expenses as between agent and client were given, a third counsel was disallowed.<sup>5</sup> In the undernoted cases the fees of three counsel have been allowed.<sup>6</sup> In the undernoted cases the fees of a third counsel have been disallowed.<sup>7</sup>

SUBSECTION (6).—*Fees not actually sent.*

**1358.** The Auditor is entitled to allow reasonable fees although not sent at the time.<sup>8</sup>

SUBSECTION (7).—*Sheriff Court.*

**1359.** Fees to counsel in the Sheriff Court cannot be recovered from the other side unless his employment is expressly authorised or sanctioned by the Sheriff.<sup>9</sup> The Sheriff may certify even after the case has been decided in the Court of Session,<sup>10</sup> but in the ordinary

<sup>1</sup> *Padwick v. Stewart*, 1874, 1 R. 697, per Lord Pres. Inglis.

<sup>2</sup> *Tannett, Walker & Co. v. Hannay & Co.*, 1874, 1 R. 440.

<sup>3</sup> *Earl of Kintore v. Pirie*, 1903, 11 S.L.T. 216.

<sup>4</sup> *Symington v. Symington*, 1874, 1 R. 1006.

<sup>5</sup> *Hood v. Gordon*, 1896, 23 R. 675.

<sup>6</sup> *Mercer v. Reid*, 1841, 3 D. 379; *Macalister v. Alexander*, 1843, 5 D. 1313; *Gallie v. Wyllie*, 1844, 7 D. 235; *Blantyre v. Dunn*, 1848, 10 D. 706; *Craigie v. Marshall*, 1850, 12 D. 983; *Primrose v. Caledonian Rly. Co.*, 1851, 13 D. 1367; *Nisbet v. Dixon & Co.*, 1853, 15 D. 778; *Christie v. Thompson*, 1859, 21 D. 751; *Walker v. Walker's Trs.*, 1862, 24 D. 1441; *Thoms v. Thoms*, 1866, 3 S.L.R. 34; *Stevens v. M'Dowall's Trs.*, 1867, 3 S.L.R. 320; *M'Dougall v. Girdwood*, 1867, 5 S.L.R. 127; *Rouledge v. Somerville*, 1867, 5 M. 267; *Duke of Buccleuch v. Cowan*, 1867, 5 M. 1054; *Taylor & Co. v. Macfarlane & Co.*, 1868, 5 S.L.R. 513; *London Steam Colliery and Coal Co. v. Wingate & Co.*, 1868, 5 S.L.R. 657; *Ogston & Tennant v. The Daily Record, Glasgow (O.H.)*, 1910, 2 S.L.T. 230; *Boyd & Forrest v. Glasgow & South-Western Rly. Co.*, 1911 S.C. 1050.

<sup>7</sup> *Mitchell v. Mein*, 1831, 9 S. 588; *Schuurman v. Stephen*, 1833, 12 S. 247; *Crawcour v. St. George Stearn Packet Co.*, 1844, 6 D. 762; *Gardiner v. Black*, 1851, 13 D. 843; *Faulks v. Park*, 1855, 17 D. 635; *Faulks v. Whitehead*, 1855, 17 D. 681; *Cargill v. Forrest*, 1856, 18 D. 662; *Stott v. M'William*, 1856, 18 D. 716; *Panmure v. Crockat*, 1856, 18 D. 788; *Elmsly v. Duncan*, 1857, 20 D. 307; *Jenkins v. Murray*, 1867, 5 S.L.R. 131; *Campbell's Exrs. v. Campbell's Trs.*, 1866, 2 S.L.R. 89.

<sup>8</sup> *Tough's Trs. v. Dumbarton Water Comms.*, 1874, 1 R. 879; *Batchelor v. Pattison*, 1876, 3 R. 1086; *Young v. Johnson & Wright*, 1880, 7 R. 760; *Sim v. Scottish National Heritable Property Company*, 1889, 16 R. 583.

<sup>9</sup> *M'Kenzie v. Blakeney*, 1879, 7 R. 51; *Wood's Trs. v. Wood*, 1900, 2 F. 870.

<sup>10</sup> *M'Kercher v. M'Quarrie*, 1887, 14 R. 1038.



case the motion should be made at the time to the judge who conducts the case; only in special circumstances may the motion be made in the Inner House.<sup>1</sup> The Sheriff's certificate remains good even although his interlocutor in which fees were allowed is recalled.<sup>2</sup> Where expenses in a Court of Session action were granted on the Sheriff Court scale and the Lord Ordinary did not sanction the employment of counsel, fees to counsel were disallowed.<sup>3</sup>

#### SUBSECTION (8).—*Miscellaneous.*

**1360.** When a jury trial was postponed on the pursuer's motion, fees which had been sent to counsel for a consultation that did not take place owing to the postponement were allowed.<sup>4</sup> It is a matter within the Auditor's discretion whether fees sent to counsel to prepare for a jury trial during negotiations for a settlement should be allowed.<sup>5</sup> Where a fee was sent to counsel with precognitions immediately after the adjustment of issues and shortly thereafter a tender was made and refused, and on the trial, three months afterwards, the pursuer obtained a verdict which only entitled him to expenses from the date of tender, it was held that the fee sent to counsel with the precognitions could not be recovered from the opposite side.<sup>6</sup> Where there is a tender by the defender which has been refused, and the pursuer is successful to a greater extent than the tender, with expenses, fees to counsel for consultation as to the acceptance of the tender are allowed to the pursuer.<sup>7</sup>

### SECTION 11.—WITNESSES.

#### SUBSECTION (1).—*Ordinary Witnesses.*

**1361.** The charge for witnesses attending a jury trial or proof should not be stated in the body of the account, but in a separate schedule appended thereto. The names of the witnesses examined should be stated separately from those not examined, and if the expenses of all or any of the latter are demanded, the grounds or reason for such demand should be stated in a note appended to the schedule. In the absence of a note, the witnesses not examined are disallowed by the Auditor.<sup>8</sup> It is in the Auditor's discretion to allow or refuse fees paid to witnesses who have been cited and not examined.<sup>9</sup> A defender was

<sup>1</sup> *Reid v. North Isles District Council of Orkney County Council*, 1912 S.C. 627.

<sup>2</sup> *Taylor v. Steel-Maitland*, 1913 S.C. 978.

<sup>3</sup> *Cook v. Horn* (O.H.), 1922, S.L.T. 381.

<sup>4</sup> *Whyte v. Grieve*, 1867, 5 S.L.R. 77; *Livingstone v. M'Gildowney*, 1896, 3 S.L.T. 241.

<sup>5</sup> *Crabbe v. Stubbs, Ltd.*, 1896, 3 S.L.T. 235.

<sup>6</sup> *Greig v. Balfour*, 1898, 25 R. 794.

<sup>7</sup> *Irvin v. Fairfield Shipbuilding Co.*, 1899, 1 F. 595.

<sup>8</sup> A.S., 15th July 1876.

<sup>9</sup> *Thoms v. Thoms' Trs.*, 1907 S.C. 343; *London Steam Colliery and Coal Co. v. Wingate & Co.*, 1868, 5 S.L.R. 657; *Petrie v. Petrie* (O.H.), 1911, 1 S.L.T. 410.

held entitled to the expenses of witnesses cited to prove statements made and not admitted on record, but which were admitted at the proof by the pursuer's witnesses.<sup>1</sup> If the pursuer fails to prove his case, in consequence of which the defender's witnesses, though properly and necessarily cited, are not examined, this will form a valid reason for the recovery of such witnesses' expenses by the defender from the pursuer.<sup>2</sup> Where witnesses are cited but not examined, a defender is treated in a more lenient way than a pursuer, for the latter knows his case and should bring no more witnesses than will prove it, whereas the former must summon witnesses to be prepared for all views of the case.<sup>3</sup> A note containing reasons why witnesses not examined should be allowed, produced at the latter of two diets of taxation, was held to comply with the Act of Sederunt.<sup>4</sup>

**1362.** The expense of bringing witnesses to the trial, maintaining them while there, and returning them to their residences, is a good charge. A successful party was allowed the expenses of bringing witnesses to Edinburgh the night before the trial,<sup>5</sup> and an opinion has been expressed that not only should witnesses who travel long distances be given an allowance for the time they are away from home along with reasonable travelling charges,<sup>6</sup> but also an allowance for subsistence on the journey so far as it is not covered by the passenger fare, as in a steamship journey.<sup>7</sup> The point often becomes of importance in shipping cases where witnesses must be detained from the ship. In a recent case<sup>8</sup> it was pointed out that the standard of liability to which a party is entitled to subject an opponent who is found liable to him in expenses is to be found, not in the prudent character of the expenditure from the point of view of the party who incurred it, but from its necessary character from the point of view of the case itself. In that case the successful party sought to charge the unsuccessful with the expenditure incurred by bringing the captain, three officers, and two men of the crew of a ship as witnesses. They were held entitled to their expenditure in respect of the captain and of the man who had been at the wheel at the moment of collision, but as regards the others they recovered only a sum representing what would have been the expense of examining the witnesses on commission. Where the defender's country agent was cited as a witness by the pursuer, and, when witnesses were ordered to retire, remained in Court as agent for the defender, he was held entitled to payment as a witness, but not to

<sup>1</sup> *Gunn v. Muirhead*, 1899, 2 F. 10.

<sup>2</sup> A.S., 15th July 1876, v. 3 (2).

<sup>3</sup> *Campbell v. Paterson*, 1848, 11 D. 325; *Thoms v. Thoms' Trs.*, 1907 S.C. 343; 14 S.L.T. 635.

<sup>4</sup> *Millar v. Millar*, 1908, 16 S.L.T. 331.

<sup>5</sup> *Butchart v. Dundee and Arbroath Rly. Co.*, 1859, 22 D. 184.

<sup>6</sup> *Willcox & Gibb's Sewing Machine Co.*, 1869, 7 S.L.R. 98.

<sup>7</sup> Lord M'Laren in *Dairon v. Dairon*, 1900, 3 F. 230.

<sup>8</sup> *Laird Line v. United States Shipping Board*, 1924 S.C. 943; see also *Parker v. North British Rly. Co.* (O.H.), 1900, 8 S.L.T. 18; *Clan Line Steamers v. Compania Navigation Sotu y' Aznar*, 1918 S.C. 87; *Ellerman Lines v. Dundee Harbour Trs.*, 1922 S.C. 646.

his travelling expenses.<sup>1</sup> A witness compelled to come by letters of second diligence is not entitled to his expenses.<sup>2</sup>

SUBSECTION (2).—*Skilled Witnesses.*

**1363.** The expenses to be charged against an opposite party are limited to proper “expenses of process” without any allowance (beyond that indicated in the table of fees) for preliminary investigations, with a proviso as to certain precognitions there noted. According to the table, “where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land surveyors, or accountants, to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such person shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall—on a motion made to him either at the trial or proof, or within eight days thereafter if in session, or if in vacation within the first eight days of the ensuing session—certify that it was a fit case for such additional allowance.” In jury trials the eight days start from the verdict, in proofs from the date of judgment, and in neither do vacation days count.<sup>3</sup> In *Davidson v. Scott*,<sup>4</sup> it was laid down that the motion for the certificate ought properly to be made at the close of the proof; when this is not done, the application must be made, after due notice to the other side, in the motion roll, but no charge for the enrolment or discussion of the motion will be allowed. The Act of Sederunt, however, does not apply to cases where evidence is heard before a judge of the Inner House, in which case the motion for certification may be made at the time of the approval of the Auditor’s report.<sup>5</sup> In this case an opinion was expressed by Lord Craighill that intimation of such a motion need not be made to the opposite side. The Divisions cannot certify the expenses of skilled witnesses, though they may have reversed the judgment of the Lord Ordinary and found the party liable in expenses entitled to expenses, as the Act of Sederunt allows no one to certify for such expenses but the judge before whom the proof or jury trial is heard.<sup>6</sup> No certificate is necessary in an action that has been settled, the Auditor being allowed to award reasonable remuneration to experts.<sup>7</sup> Where after the pursuer’s evidence had been led a tender was accepted and both parties moved for certification of their skilled witnesses, the Court refused the motions, holding that in the circumstances the Act of Sederunt did not apply.<sup>8</sup> Certification of skilled

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<sup>1</sup> *Elias v. Black*, 1855, 18 D. 135.

<sup>2</sup> *Mason*, 1830, 5 Mur. 129.

<sup>3</sup> *Scott v. Lanarkshire and Dumbartonshire Rly. Co.*, 1897, 5 S.L.T. 165.

<sup>4</sup> 1915 S.C. 1120.

<sup>5</sup> *Lord Elphinstone v. Monkland Iron and Coal Co.*, 1887, 14 R. 449.

<sup>6</sup> *Gibson v. West Lothian Oil Co.*, 1887, 14 R. 578.

<sup>7</sup> *Clements v. Corporation of Edinburgh*, 1905, 7 F. 651.

<sup>8</sup> *Mill v. Dundas*, 1920 S.C. 208.



witnesses will entitle them to the expenses of necessary preliminary investigations,<sup>1</sup> but will not, unless in exceptional cases, entitle them to more than £2, 2s. per day for attendance at Court.<sup>2</sup> In addition to the fee for their actual testimony as allowed by the table of fees, skilled witnesses are entitled to their out-of-pocket expenses and also to a fee for their trouble; the fixing of the amount of this additional remuneration lies in the discretion of the Auditor.<sup>3</sup> English counsel giving evidence on English law are not treated as ordinary professional men, and are entitled to large fees.<sup>4</sup> Medical expert witnesses are also entitled to large fees.<sup>5</sup> Usually the expense of one accountant is allowed,<sup>6</sup> but two have been passed.<sup>7</sup> The fees of scientific witnesses are allowed though they do not prove any point for which they were adduced and even where they disprove the case of the party adducing them,<sup>8</sup> but they are not allowed extra remuneration if they have not themselves investigated the facts upon which their opinion is asked.<sup>9</sup>

## SECTION 12.—MISCELLANEOUS.

### SUBSECTION (1).—*Commission.*<sup>10</sup>

**1364.** For a commissioner's fee both parties are liable jointly and severally.<sup>11</sup> The agents are also personally liable,<sup>12</sup> though not for the fees of an accountant, engineer, or other reporter under a remit made by the Court.<sup>13</sup> A commissioner's fee varies. In the ordinary case £5, 5s. *per diem* is usual, but more has been allowed to an experienced commissioner in examination of havers,<sup>14</sup> and £10, 10s. *per diem* was given to a British consul to examine a foreign witness abroad.<sup>15</sup> If a witness examined on commission appears and is examined at the trial, the expenses of the commission will not be allowed against the unsuccessful party.<sup>16</sup> Where, however, a witness who had been

<sup>1</sup> *Caledonian Rly. Co. v. Glenboig Union Fireclay Co.*, 1912 S.C. 511.

<sup>2</sup> *Ebbw Vale Steel, Iron, and Coal Co. v. Murray*, 1898, 25 R. 925.

<sup>3</sup> *Shaw & Shaw v. J. & T. Boyd*, 1907 S.C. 646; *Whiteley, Ltd. v. Dobson, Molle & Co.*, 1902 (O.H.), 10 S.L.T. 325.

<sup>4</sup> *Whitehaven and Furness Rly. Co. v. Bain*, 1851, 13 D. 944; *Parnell v. Walter*, 1890, 17 R. 552.

<sup>5</sup> *Stewart v. Padwick*, 1873, 11 M. 467; *A. B. v. C. D.*, 1894, 22 R. 186; *M. v. G.*, 1902, 10 S.L.T. 264; *Crossan v. Caledonian Rly. Co.*, 1902, 5 F. 187; *Watson v. Caledonian Rly. Co.*, 1901, 3 F. 999; *Turnbull v. North British Rly. Co.*, 1903, 40 S.L.R. 699; 11 S.L.T. 120; *Govan v. J. & W. McKillop*, 1909 S.C. 562.

<sup>6</sup> *Whiteley, Ltd. v. Dobson, Molle & Co.*, *supra*.

<sup>7</sup> *Railton v. Matthews & Leonard*, 1847, 9 D. 1140; *Tannett, Walker & Co. v. Hannay & Son*, 1874, 1 R. 440.

<sup>8</sup> *Stott v. M'William*, 1856, 18 D. 716.

<sup>9</sup> *Ferguson v. Johnston*, 1886, 13 R. 635.

<sup>10</sup> *Maclaren*, p. 492.

<sup>11</sup> *Ballantine*, 1884, 22 S.L.R. 136.

<sup>12</sup> *A. B. v. C. D.*, 1843, 6 D. 95; *M'Lachlan v. Flowerdew*, 1851, 13 D. 1345.

<sup>13</sup> *Regulation 7, A.S.*, 15th July 1876.

<sup>14</sup> *Tannett, Walker & Co. v. Hannay & Sons*, 1874, 1 R. 440 (£6, 6s.); *Menzies v. Baird* (O.H.), 1912, 1 S.L.T. 84 (£7, 7s.).

<sup>15</sup> *Owners of the "Hilda" v. Owners of the "Australia"*, 1885, 12 R. 547.

<sup>16</sup> *Napier v. Campbell*, 1843, 5 D. 858; *Maclaine v. Cooper*, 1846, 8 D. 429; *Napier v. Leith*, 1860, 22 D. 1262; *Speirs v. Caledonian Rly. Co.*, 1921 S.C. 889.

examined on commission, in the *bona-fide* belief that he could not be present at the trial, came suddenly and unexpectedly home and was able to be examined at the trial, the expenses of the commission were allowed to the successful party.<sup>1</sup> The expense of a commission which failed in respect that the witness—a seaman—had deserted his ship was held to be a good charge against the unsuccessful party.<sup>2</sup> Where a witness examined on commission was brought a long journey for that purpose, the expense of the commission was limited to what would have been the expenses of examination at the home of the witness.<sup>3</sup> The cost of examining a witness on commission and bringing him to the proof, where he was not examined, was disallowed, even though the opposite side examined him and opened the commission.<sup>4</sup> Where a pursuer pleaded that the defence was irrelevant and obtained a commission to examine a witness, his plea of irrelevancy having been sustained, he was nevertheless refused the expenses of the commission on the ground that the evidence of the witness in question was not so essential as to overbear the general rule that an unsuccessful litigant is not liable for the expenses of a proof never allowed.<sup>5</sup> In a case of importance the Court allowed the expenses of an Edinburgh agent going to London to be present at an examination of a principal witness,<sup>6</sup> though taken on adjusted interrogatories,<sup>7</sup> but in a subsequent case,<sup>8</sup> these expenses were disallowed, and the expense of a London solicitor substituted. Havers are entitled to a witness fee.<sup>9</sup> The party's law agent is liable for the expenses of the haver's appearance.<sup>10</sup>

#### SUBSECTION (2).—*Arbiter.*

**1365.** The office of arbiter being of an honorary character, an arbiter has no legal claim to be remunerated apart from previous stipulation with the parties. That an arbiter is to receive remuneration may be inferred from circumstances.<sup>11</sup> Apart from special agreement, an arbiter has a claim for remuneration under s. 32 of the Lands Clauses Act, 1845.<sup>12</sup> Though he may refuse to deliver up his award until he has been remunerated, an opinion has been expressed that the Court will interfere to make an arbiter deliver his award upon payment of a reasonable fee.<sup>13</sup> There is an inherent power in an arbiter to award expenses.<sup>14</sup>

<sup>1</sup> *Couper v. Cullen*, 1874, 1 R. 1101.

<sup>2</sup> *Napier v. Leith*, 1860, 22 D. 1262.

<sup>3</sup> *Graham v. Borthwick*, 1875, 2 R. 812.

<sup>4</sup> *Parker v. North British Rly. Co.*, 1300, 8 S.L.T. 18.

<sup>5</sup> *North of Scotland Bank v. Mackenzie (O.H.)*, 1925 S.L.T. 352.

<sup>6</sup> *Inverness and Aberdeen Junction Rly. Co. v. Gowans & Mackay*, 1865, 1 S.L.R. 75.

<sup>7</sup> *Armstrong's Trs. v. Leith Bank*, 1834, 12 S. 510.

<sup>8</sup> *Lumsden v. Hamilton*, 1845, 7 D. 300.

<sup>9</sup> *Forsyth v. Pringle Taylor and Lamond Lowson*, 1906, 14 S.L.T. 658.

<sup>10</sup> *Law v. Law's Trs. (O.H.)*, 1904, 12 S.L.T. 240.

<sup>11</sup> *Henderson v. Paul*, 1867, 5 M. 628.

<sup>12</sup> *Murray v. North British Rly. Co.*, 1900, 2 F. 460.

<sup>13</sup> *Macandrew, Wright & Murray v. North British Rly. Co.*, 1893, 1 S.L.T. 143.

<sup>14</sup> *Pollich v. Heatley*, 1910 S.C. 469.

SUBSECTION (3).—*Judicial Referee.*

**1366.** A judicial referee is an officer of Court and entitled to remuneration.<sup>1</sup> His charges may be remitted by the Court to taxation.<sup>2</sup>

SUBSECTION (4).—*Accountant.*

**1367.** A party is entitled to have the assistance of an accountant in the preparation of his record.<sup>3</sup> His remuneration is very much at the discretion of the Auditor.<sup>4</sup>

<sup>1</sup> *Baxter v. Macarthur*, 1838, 16 S. 1085 ; *Henderson v. Paul*, 1867, 5 M. 628, per Lord Neaves at p. 633.

<sup>2</sup> *Fraser v. Johnstone's Trs.*, 1833, 12 S. 209 ; *Jamieson v. MacKinnon*, 1882, 19 S.L.R. 824.

<sup>3</sup> *Miller v. Ure's Reps.*, 1853, 15 D. 781 ; *Inglis v. Baird*, 1861, 23 D. 872.

<sup>4</sup> *Jamieson v. MacKinnon*, *supra*.

## EXPERT.

*See* EVIDENCE; EXPENSES.

## EXPIRY OF THE LEGAL.

*See* ADJUDICATION.



## EXPLOSIVE SUBSTANCES.

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## SECTION 1.—INTRODUCTORY.

**1368.** The law relating to explosive substances is, for the most part, contained in various Acts of Parliament and Orders having statutory force. The principal Act is the Explosives Act, 1875<sup>1</sup> (referred to in the present article as “the Act,” or “the principal Act”), which has been amended by the Explosive Substances Act, 1883<sup>2</sup> and the Explosives Act, 1923.<sup>3</sup> The Act (s. 83) provides that Orders in Council and Orders of the Secretary of State, made in terms of the Act, are to be treated as part of the Act, and cannot be challenged as *ultra vires* in any legal proceeding. Orders in Council may also be made under the Revenue Act, 1909,<sup>4</sup> fixing fees for licences for importation of explosives. The Secretary of State may also make Orders under the Explosives Act, 1923.<sup>5</sup>

## SECTION 2.—DEFINITIONS.

**1369.** The term “explosive” means (1) gunpowder, nitro-glycerine, dynamite, etc., etc., and every other substance, whether similar to those above mentioned or not, used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect; and (2) includes fog-signals, fireworks, fuses, etc., etc., and every adaptation or preparation of an explosive as above defined (s. 3). It also includes any material for making any explosive substance, and any apparatus, machine, implement, or material or parts thereof used or intended to be used or

<sup>1</sup> 38 & 39 Vict. c. 17.<sup>2</sup> 46 & 47 Vict. c. 3.<sup>3</sup> 13 & 14 Geo. V. c. 17.<sup>4</sup> 9 Edw. VII. c. 43, s. 11.<sup>5</sup> ss. 1 (1), 2; see para. 1381, *infra*.

adapted for causing or aiding in causing any explosion in or with any explosive substance.<sup>1</sup> "Magazine" includes any ship or other vessel used for the purpose of keeping any explosive. "Factory magazine" means a building for keeping the finished explosive made in the factory, and includes, if such explosive is not gunpowder, any building for keeping the partly manufactured explosive, or the ingredients of such explosive. "Store" means an existing gunpowder store as defined by the Act (s. 20), or a place for keeping an explosive licensed by a local authority (s. 108).

**1370.** It is provided that, by Order in Council, any substance which appears to be specially dangerous to life or property by reason either of its explosive properties, or of any process in the manufacture thereof being liable to explosion, may be deemed to be an explosive under the Act (s. 104). Persons carrying on any of the following businesses are to be subject to the provisions of the Act regarding "manufacture," viz. dividing into its components, or otherwise breaking up or unmaking any explosive, or remaking, altering, or repairing any explosive (s. 105). Explosives may be classified, and the composition, quality, and character thereof may be defined by Order in Council (s. 106).

### SECTION 3.—GUNPOWDER.

#### SUBSECTION (1).—*Manufacture and Keeping.*

**1371.** Part I. of the Act contains the law relating to gunpowder, and deals first with the manufacture and keeping of gunpowder. The manufacture of gunpowder or any process thereof must be carried on only at a factory for gunpowder, either lawfully existing or licensed under the Act, an exception being made of the manufacture of a small quantity for the purpose of chemical experiment, and not for practical use or sale. When made in breach of these provisions it is subject to forfeiture, and the manufacturer to a fine (s. 4). It must be stored only in authorised places; but if it is for private use and not for sale, it may be stored to the extent of 30 lb. in one place, and an exception is also made of gunpowder kept for conveyance in terms of the Act. Where it is kept in an unauthorised place it is liable to forfeiture, and the occupier and owner of the premises to a fine (s. 5).<sup>2</sup> Regulations for all gunpowder factories and magazines are laid down, including rules applicable to workmen therein (ss. 9–11). Rule 11 has been amended by the Explosives Act, 1923,<sup>3</sup> to the extent of providing restrictions on the employment of young persons in gunpowder factories and magazines. Licences may be altered, determined, or transferred to new occupiers, and factories

<sup>1</sup> Explosive Substances Act, 1883 (46 & 47 Vict. c. 3), s. 9 (1).

<sup>2</sup> Amended as to amount of fine by the Explosives Act, 1923, *cit. supra*; cf. the case of *M'Callum and Sealy v. Machullich*, 1870, 9 M. 46, under a similar provision of the Gunpowder Act, 1860 (23 & 24 Vict. c. 139), which was repealed by the 1875 Act.

<sup>3</sup> *Cit. supra.*

or magazines may be enlarged or altered in accordance with the Act (s. 12). Factories or magazines existing before the Act must be held by continuing certificate (s. 14). Store licences are to be obtained from the local authority (s. 15). Orders in Council may be issued prescribing the situation and construction of stores (s. 16), and general rules are laid down for such stores, including, in the case of breach of such rules, provision for forfeiture of the gunpowder and fines for the occupier of the store (s. 17). Rule 10 has been amended by the Explosives Act, 1923,<sup>1</sup> which provides restrictions on the employment of young persons in gunpowder stores. Store licences are not transferable, and must be renewed annually (s. 18). Special rules for the regulation of the workmen in stores may, with the sanction of the Secretary of State, be made by the occupier. An existing gunpowder store is defined, and requires a continuing certificate from the local authority (s. 20).

#### SUBSECTION (2).—*Retail Dealing.*

**1372.** Premises for the keeping of gunpowder may be registered with the local authority. Such registration is not transferable, and is renewable annually (s. 21). General rules for registered premises are laid down with provision, in the event of breach, for forfeiture and fine (s. 22).<sup>2</sup> Due precautions against fire or explosion must be taken by occupiers of all factories, magazines, stores, and registered premises (s. 23). It has been held<sup>3</sup> that the question whether "due precaution" has been taken is a question of fact only, and cannot competently form the subject of an appeal under the Summary Prosecutions Appeals Act, 1875.<sup>4</sup> The quantities of gunpowder to be allowed in buildings are prescribed, and provision is made for arbitration (ss. 24, 25). The Revenue Act, 1909,<sup>5</sup> now regulates the fees on licences for the importation of explosives, and repeals s. 26 of the Act dealing with that matter. Adjoining buildings in connection with the manufacture and keeping of gunpowder are to be treated as one place, and shall be licensed or registered as such (s. 27). Registers of store licences and registered premises are to be kept by the local authority (s. 28). In case of the death, bankruptcy, or incapacity of the occupier of a licensed store or of registered premises, the business of the occupier may be carried on by another without penalty till a new licence is obtained (s. 29).

#### SUBSECTION (3).—*Sale.*

**1373.** Hawking (s. 30), or sale to children under thirteen (s. 31), is forbidden. Gunpowder exceeding 1 lb. in weight must be sold in closed, labelled packages (s. 32).

<sup>1</sup> *Cit. supra*, s. 3.

<sup>2</sup> Amended as to amount of fine by the Explosives Act, 1923, s. 3.

<sup>3</sup> *Dykes v. Wm. Dixon, Ltd.*, 1885, 12 R. (J.) 17.

<sup>4</sup> 38 & 39 Vict. c. 62, s. 3.

<sup>5</sup> 9 Edw. VII. c. 43, s. 11.



SUBSECTION (4).—*Conveyance.*

**1374.** General rules are given as to packing of gunpowder for conveyance (s. 33), and it is provided that harbour authorities, railway and canal companies, and occupiers of wharves or docks shall make bye-laws as to the conveyance, loading, etc., of gunpowder (ss. 34, 35, 36). The Secretary of State may make, rescind, alter, or add to bye-laws as to conveyance of gunpowder by road or otherwise in cases in which bye-laws made under any other provision of the Act do not apply, and for the purpose of any mode of conveyance which is not a conveyance by land this provision is to be construed as if "ship" and "boat" were included in the term "carriage" (s. 38).

## SECTION 4.—OTHER EXPLOSIVES.

**1375.** Part II. of the Act contains the law relating to explosives other than gunpowder. Except as modified, the provisions relating to gunpowder (Part I.) apply (s. 39). The modifications consist of different requirements of particulars in draft licences, prescribed general rules in place of the general rules in Part I. relating to factories, magazines, stores, and registered premises, rules relating to packing, maximum amount to be kept privately and minimum amount to be sold unenclosed, keeping of different explosives in the same store, amount of gunpowder to be kept with other explosives and prescribed general rules thereon, labelling of explosives, and provisions regarding importation and conveyance (s. 40). The Act is not to apply to the filling or conveying, for private use and not for sale, of any safety cartridges to the amount allowed by the Act to be kept for such use (s. 41). The provisions of s. 29 of the Passengers Act, 1855,<sup>1</sup> and ss. 23–27 of the Merchant Shipping Act, 1873,<sup>2</sup> are applied to every explosive within the meaning of the Act (s. 42). Specially dangerous explosives may be, by Order in Council, either absolutely prohibited or subjected to extraordinary conditions (s. 43).

**1376.** Occupiers of factories for explosives do not require a factory licence for making up cartridges or charges for cannon or blasting "not containing within themselves their own means of ignition," and explosives made up into such cartridges or charges may be kept in magazines, stores, or registered premises as if the explosive were not so made up (s. 44). The manufacturer of a new explosive, or new form of explosive similar to the one specified in his licence, shall not be deemed to have manufactured the same in an unauthorised place if the manufacture is only for the purposes of experiments, and if he notifies the Secretary of State (s. 45). The occupier of a magazine, store, or registered premises does not need a factory licence in respect of his making or selling cart-

<sup>1</sup> 18 & 19 Vict. c. 119, repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 301.

<sup>2</sup> 36 & 37 Vict. c. 85, repealed by the Merchant Shipping Act, 1894, ss. 446–450.

ridges for small arms or blasting cartridges provided he observes certain conditions (ss. 46, 47). The local authority have power to issue licences in respect of "small firework factories" under certain conditions, and the regulation of such factories is provided for (ss. 48, 49). A licence need not be taken out, nor need premises be registered, for the keeping of percussion caps, safety-fuses for blasting, fog-signals kept by railway companies for use on the railway, or any prescribed explosive. Harbour authorities, railway or canal companies, or occupiers of wharves need not make bye-laws regarding conveyance, loading, or unloading such explosives (s. 50).

## SECTION 5.—ADMINISTRATIVE PROVISIONS.

### SUBSECTION (1).—*Government Supervision.*

**1377.** Part III. of the Act relates to administration. Government inspectors are to be appointed (s. 53), from which office all persons connected with the business of explosives are barred (s. 54). The powers of such inspectors are detailed (s. 55), including power to require the occupiers of factories, magazines, or stores to remedy dangerous practices, etc. (s. 56). An annual report is to be made to the Secretary of State by such inspectors (s. 57). Railway inspectors and inspectors for the purposes of the Merchant Shipping Act, 1854,<sup>1</sup> repealed by the Merchant Shipping Act, 1894,<sup>2</sup> may be directed by the Board of Trade to enquire into the observance of the Act by railway or canal companies, or in any harbour or ship (s. 58). Inspectors under the Coal Mines Regulation Act, 1872,<sup>3</sup> later the Coal Mines Regulation Act, 1887,<sup>4</sup> and now the Coal Mines Act, 1911,<sup>5</sup> may be, by order of the Secretary of State, directed to act as Government inspectors under the Act (s. 59). Copies of licences confirmed by the Secretary of State and of special rules under the Act certified by a Government inspector shall be evidence thereof (s. 60). A Government inspector may keep and convey samples of a reasonable amount (s. 61), and the salaries of Government inspectors and the expenses incurred by such inspectors and by the Secretary of State in carrying the Act into execution shall be defrayed out of public moneys (s. 62).

### SUBSECTION (2).—*Notice of Accidents.*

**1378.** Notice is to be sent to the Secretary of State of accidents by explosion or fire in connection with factories, magazines, stores, carriages, ships, or boats (s. 63). Where such an accident has occurred in and wholly or partly destroyed a factory magazine, magazine, or store, certain conditions of reconstruction of the buildings are imposed (s. 64). Provision is made for coroners' inquests on deaths from accidents, enquiries into accidents, and formal investigation in serious cases (ss. 65, 66).<sup>6</sup>

<sup>1</sup> 17 & 18 Vict. c. 104.

<sup>2</sup> 57 & 58 Vict. c. 60.

<sup>3</sup> 35 & 36 Vict. c. 76.

<sup>4</sup> 50 & 51 Vict. c. 58.

<sup>5</sup> 1 & 2 Geo. V. c. 50.

<sup>6</sup> See also the Fatal Accidents Inquiry (Scotland) Act, 1895 (58 & 59 Vict. c. 36), and the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act, 1906 (6 Edw. VII. c. 35).

SUBSECTION (3).—*Local Supervision.*

**1379.** Harbour authorities and canal companies have power to undertake carriage of explosives on land and sea within their jurisdiction (s. 71). Local authorities may provide magazines under licence, and for such purposes may acquire land; the authority may maintain or manage such magazines and may charge for use of them, and the Lands Clauses Acts are incorporated with the provisions (s. 72). A power of search is given for explosives when there is reasonable cause to believe that such are in any place in contravention of the Act, or that an offence has been or is being committed with respect to an explosive in any place, or that the provisions of the Act are not duly observed. Those empowered to search are Government inspectors, constables, or any officers of the local authority, if such constables or officers are specially authorised by warrant of a justice or by written order from a Government inspector or a police superintendent or other police officer of equal or superior rank (s. 73). The foregoing inspectors or officers may also seize and detain explosives believed to be liable to forfeiture under the Act until a Court of summary jurisdiction (in Scotland the Sheriff or Sheriff-Substitute, s. 109) determines the question of liability to forfeiture (s. 74). Government inspectors, chief officers of police (for Scotland see s. 109), and superior officers of the local authority have power to inspect wharves, carriages, and boats where explosives are *in transitu* (s. 75). Where Government inspectors or officers of the local authority take, in pursuance of their powers, samples of explosives, they must pay the market value thereof (s. 76).

SUBSECTION (4).—*General Powers of Secretary of State.*

**1380.** Powers given by the Act are cumulative, but the Secretary of State, by Order, may, on application by a local authority or any person making, keeping, importing, exporting, or selling explosives within its jurisdiction, *inter alia*, repeal, alter, or amend any Act of Parliament, charter, or custom respecting the manufacture, keeping, conveyance, importation, exportation, or sale of explosives (s. 103).

**1381.** The Explosives Act, 1923,<sup>1</sup> provides, *inter alia*, that the Secretary of State, if satisfied that owing to the existence of special circumstances special precautions against accidents by fire or explosives in factories, etc., require to be taken under the provisions of the principal Act,<sup>2</sup> may, by Order, prescribe the special precautions to be taken (s. 1). As noted above,<sup>3</sup> amendments are made on rules 10 and 11 under ss. 10 and 17 respectively of the principal Act<sup>4</sup> (s. 2), and on ss. 5 and 22 of the principal Act (s. 3). It is provided that the powers of the Ministry of Transport under s. 34 of the principal Act as respects any part of the coastal or tidal waters for which there is no harbour authority may,

<sup>1</sup> 13 & 14 Geo. V. c. 17.<sup>2</sup> 38 & 39 Vict. c. 17, s. 23.<sup>3</sup> Para. 1321, *supra*.<sup>4</sup> 38 & 39 Vict. c. 17, ss. 10, 17.



as respects any "dockyard port" (as defined by the Dockyard Port Regulation Act, 1865<sup>1</sup>), be exercised by the Admiralty (s. 4).

SECTION 6.—PROCEEDINGS, EXEMPTIONS, ETC.

SUBSECTION (1).—*Proceedings.*

**1382.** Part IV. of the Act contains supplemental provisions relating to legal proceedings, exemptions, and definitions. Trespassers may be removed from factories, magazines, and stores, or land immediately adjoining thereto, and may be fined (s. 77). Any person found committing any act liable to a penalty under the Act and tending to cause explosion or fire in or about any factory, magazine, store, railway, canal, harbour, wharf, carriage, ship, or boat, is liable to arrest without a warrant (s. 78). Persons found guilty of any offence punishable under the Act only by fine, may be imprisoned at the discretion of the Court if they are of opinion that such offence (being an act or neglect) was reasonably calculated to endanger life or limb (s. 79). Punishment is provided for throwing fireworks in streets or public places, for forging or using false documents, and defacement of notices (ss. 80–82). Provision is made for Orders in Council and Orders of the Secretary of State (s. 83); publication of bye-laws and notices, etc. (s. 84); and form and service of requisitions and notices (s. 85). The occupier of any factory, magazine, store, or registered premises is exempt from penalty and forfeiture in respect of any offence under the Act for which as occupier he is liable if it be proved that another person was the real offender and that the occupier had taken due precaution, etc. (s. 87). Carriers, owners, or masters of ships or boats are also exempt where consignor, consignee, or some other person is at fault (s. 88). A Court having power to forfeit explosives may in lieu of forfeiture substitute a penalty not exceeding the value of the explosive (s. 89).

**1383.** Jurisdiction, for the purposes of the Act, in harbours, tidal waters, or inland waters, etc., is defined (s. 90). Prosecution of offences under the Act may be either summary or on indictment (s. 91), and the accused has (if charged before a Court of summary jurisdiction—in Scotland, the Sheriff of the county or any of his substitutes—with an offence for which the penalty exceeds £100) the right to object to being tried by a Court of summary jurisdiction, and thereupon the Court may deal with the case as if the accused were charged with an indictable offence (s. 92). An appeal may be taken from the Court of summary jurisdiction to quarter sessions (in Scotland to the Sheriff) (s. 93). Where proceedings are taken in any Court in respect of offences under the Act, the Court may, where the offence is indictable at common law or by some other Act, direct that the proceedings before them shall not be continued, and that proceedings shall be taken for indictment (s. 102).

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<sup>1</sup> 28 & 29 Vict. c. 125.

**1384.** The Explosive Substances Act, 1883,<sup>1</sup> provides that persons unlawfully and maliciously causing, by any explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property, shall be guilty of felony (in Scotland, of a high crime and offence) (s. 9 (2)), and on conviction shall be liable to penal servitude or imprisonment (s. 2). Similar penalties are provided in respect of attempting or conspiring to cause an explosion, keeping or making explosives with intent to endanger life or property (s. 3), making or being in possession of explosives under suspicious circumstances (s. 4), or being accessory to any crime under the Act. Where the Lord Advocate has reasonable ground to believe that a crime under the Act has been committed, he may order an enquiry to be held before the Sheriff or Sheriff-Substitute for the examination of witnesses on oath (s. 6 (1)). Absconding witnesses may be apprehended (s. 6 (4)). Prosecution is not to proceed except by consent of the Lord Advocate, and in framing indictments the same criminal act may be charged in different counts as constituting different crimes under the Act (s. 7). Search for and seizure of explosive substances may be made for the purposes of detection, as provided in the Explosives Act, 1875,<sup>2</sup> and the master or owner of a vessel may search for and throw overboard dangerous goods, as provided in the Merchant Shipping Act, 1873.<sup>3</sup>

#### SUBSECTION (2).—*Exemptions and Savings.*

**1385.** Government property of the following kinds is exempt from the provisions of the Act: In factories, ships or carriages, volunteer stores or in conveyance (s. 97); but provisions as to trespass, etc., are to remain in force (*ibid.*). Rocket and fog stations are also exempted from the provisions of the Act, as are magazines in the Mersey (ss. 98, 99). Savings are provided for owners or masters of ships or boats, carriers, warehousemen, or persons in charge of carriages, in respect of acts done in breach of the Act, but rendered necessary by reason of stress of weather, inevitable accident, or other emergency (s. 100); and also for gunpowder, rockets, or other explosives on board ships in pursuance of the provisions of the Merchant Shipping Act, 1854,<sup>4</sup> now the Merchant Shipping Act, 1894.<sup>5</sup> The Act does not exempt from liability persons committing nuisances, etc., not provided for (s. 102).

#### SUBSECTION (3).—*Application of the Act to Scotland.*

**1386.** Definitions are given of terms in the Act with respect to Scotland (s. 109). In Scotland the local authority is (i) in burghs, the magistrates and town council; (ii) in harbours, the harbour authority, to the exclusion of any other local authority; (iii) in any place other than

<sup>1</sup> 46 & 47 Vict. c. 3.

<sup>2</sup> 38 & 39 Vict. c. 17, ss. 73, 74, 75, 89, and 96.

<sup>3</sup> 36 & 37 Vict. c. 85, s. 8, repealed by the Act of 1894 (57 & 58 Vict. c. 60), s. 448.

<sup>4</sup> 17 & 18 Vict. c. 104.

<sup>5</sup> 57 & 58 Vict. c. 60.

burghs or harbours, the justices of the peace for the county (s. 110). The local rate for defraying expenses of local authorities is (i) in burghs, the police rate or assessment; (ii) in harbours, any moneys, fund, or rate applicable or leviable by the harbour authority for harbour purposes; (iii) in other places, the county general assessment (s. 111). The Secretary of State may, on their application, declare by Order that the police commissioners of any burgh are the local authority, including the justices of the peace for the county, but saving the powers of harbour authorities (s. 112). Local authorities have, with regard to the purchase and taking of lands otherwise than by agreement, the same powers as local authorities under the Public Health (Scotland) Act, 1867,<sup>1</sup> now the Public Health (Scotland) Act, 1897<sup>2</sup> (s. 113). By the Local Government (Scotland) Act, 1889,<sup>3</sup> the administrative power in counties is transferred to county councils. Provisions are enacted with regard to making and enforcing bye-laws, prosecution of offences, recovery of penalties, forfeitures, etc. (s. 114). With regard to the part of the Clyde estuary which lies below the jurisdiction of the Trustees of the Clyde Navigation, the Board of Trade may make bye-laws (s. 115).

#### SECTION 7.—FIREARMS.

**1387.** The Firearms Act, 1920,<sup>4</sup> provides that, for the purposes of the Explosive Substances Act, 1883, any firearm within the meaning of the 1920 Act shall be deemed to be an explosive substance (s. 18 (13)), and that any person having in his possession or under his control a firearm or ammunition, with intent by means thereof to endanger life or cause serious injury to property, or to enable any other person by means thereof to endanger life, etc., shall be deemed to have been guilty of an offence under s. 3 of the Explosive Substances Act, 1883.<sup>5</sup>

#### SECTION 8.—OTHER STATUTORY PROVISIONS.

##### SUBSECTION (1).—*Customs.*

**1388.** Under the Customs Consolidation Act, 1876,<sup>6</sup> the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or by Order in Council (s. 43). In case of public emergency, exporters and shippers of explosives must enter the same before shipment, and in the entry outwards or coastwise must correctly describe the explosive; penalties and forfeiture are to be imposed for default (s. 139). The Customs and Inland Revenue Act, 1879,<sup>7</sup> provides for penalties and forfeiture for the export or carriage coastwise of explosives, etc. (s. 8). The Customs and Inland Revenue Act, 1883,<sup>8</sup> provides that all explosives within the meaning of the Explosives Act, 1875,<sup>9</sup> whose

<sup>1</sup> 30 & 31 Vict. c. 101, s. 90.

<sup>4</sup> 10 & 11 Geo. V. c. 43, s. 7.

<sup>7</sup> 42 & 43 Vict. c. 21.

<sup>2</sup> 60 & 61 Vict. c. 38.

<sup>5</sup> 46 & 47 Vict. c. 3, s. 3.

<sup>8</sup> 46 & 47 Vict. c. 10.

<sup>3</sup> 52 & 53 Vict. c. 50.

<sup>6</sup> 39 & 40 Vict. c. 36.

<sup>9</sup> 38 & 39 Vict. c. 17.



unloading or landing is subject to restrictions imposed by or in pursuance of that Act, and all explosive substances within the meaning of the Explosive Substances Act, 1883,<sup>1</sup> are to be deemed "restricted goods" within the meaning of the Customs Consolidation Act, 1876.<sup>2</sup> The Revenue Act, 1889,<sup>3</sup> provides that the conveyance of explosives under the Explosives Act, 1875,<sup>4</sup> or explosive substances under the Explosive Substances Act, 1883,<sup>5</sup> to the Isle of Man from Great Britain, or *vice versa*, is to be deemed to be exportation or importation respectively, and therefore to come within the provisions of the Customs Acts (s. 4).

#### SUBSECTION (2).—*Post Office.*

**1389.** The Post Office (Protection) Act, 1884,<sup>6</sup> imposes penalties on persons placing in or against any post office letter-box any explosive substance (s. 3), and on persons sending postal packets containing any explosive substance (s. 4 (1) (a)).

#### SUBSECTION (3).—*Fisheries.*

**1390.** The Fisheries (Dynamite) Act, 1877,<sup>7</sup> prohibits under penalties the use of dynamite or other explosive substance to catch or destroy fish in a public fishery (s. 2). The Salmon and Freshwater Fisheries Act, 1923,<sup>8</sup> which is not a Scottish Act, but applies, *inter alia*, to so much of the River Esk, with its banks and tributary streams up to their source, as is situated in Scotland (s. 83), prohibits the use of dynamite or other explosive substance with intent thereby to take or destroy fish in any waters—including any territorial waters adjoining the coast of England or Wales (s. 9 (a)).

#### SUBSECTION (4).—*Coal Mines.*

**1391.** The Coal Mines Act, 1911,<sup>9</sup> which repeals, *inter alia*, the Coal Mines Regulation Act, 1896,<sup>10</sup> enacts that the Secretary of State may, by Order, regulate the supply, use, and storage of explosives at mines, and may, by Order, prohibit, either absolutely or conditionally, dangerous explosives to be used in mines (s. 61 (1)), and also that no explosives shall be used in mines except those provided by the owner, who shall not charge to the workman a price exceeding the actual net cost of the explosive to the owner (s. 61 (2)). Schedule I. Part C of the 1911 Act contains a form of return of explosives to be rendered yearly by the owner, agent, or manager of a mine to the inspector of the division (s. 18 (1)).

<sup>1</sup> 39 & 40 Vict. c. 36.

<sup>3</sup> 52 & 53 Vict. c. 42.

<sup>5</sup> *Cit. supra.*

<sup>7</sup> 40 & 41 Vict. c. 64.

<sup>9</sup> 1 & 2 Geo. V. c. 50.

<sup>2</sup> *Cit. supra.*

<sup>4</sup> *Cit. supra.*

<sup>6</sup> 47 & 48 Vict. c. 76.

<sup>8</sup> 13 & 14 Geo. V.

<sup>10</sup> 59 & 60 Vict. c. 43.

SUBSECTION (5).—*Carriage.*

**1392.** The Merchant Shipping Act, 1894,<sup>1</sup> contains provisions as to the carriage of explosives on board emigrant ships (s. 301 (*a*)), and, generally, restrictions on the carriage of explosives on any vessel, with penalties, including forfeiture, for breach of these regulations (ss. 446–450). The Carriage of Goods by Sea Act, 1924,<sup>2</sup> provides, *inter alia* (Sched., Art. IV. (6)), that goods of an explosive nature, to the shipment whereof the carrier, master, or agent of the carrier, has not consented, with knowledge of their nature and character, may be dealt with by the carrier without compensation. This Act also expressly does not affect the operations of the above-mentioned sections of the 1894 Act<sup>3</sup> (s. 6 (2)).

SUBSECTION (6).—*Films.*

**1393.** The Celluloid and Cinematograph Films Act, 1922,<sup>4</sup> provides that, for the purposes of that Act, the expression “celluloid” does not include any substances which are explosives within the meaning of the Explosives Act, 1875<sup>5</sup> (s. 9).

SUBSECTION (7).—*Emergency Legislation.*

**1394.** Reference should be made to the Emergency Powers Act, 1920,<sup>6</sup> which confers on the Secretary of State, during a proclamation of emergency, wide powers to take any measures essential to the public safety.

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<sup>1</sup> 57 & 58 Vict. c. 60.

<sup>3</sup> Secs. 446–450 inclusive.

<sup>5</sup> 38 & 39 Vict. c. 17.

<sup>2</sup> 14 & 15 Geo. V. c. 22.

<sup>4</sup> 12 & 13 Geo. V. c. 35.

<sup>6</sup> 10 & 11 Geo. V. c. 55.

## EXPORT.

*See* CUSTOMS.

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## EXPOSING CHILDREN.

*See* CHILDREN AND YOUNG PERSONS; CRIME.

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## EXTENSION OF JUDGMENT.

*See* EXTRACT; JUDGMENTS EXTENSION ACTS.

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## EXTENSION OF PATENTS.

*See* PATENT.



# EXTENT—OLD AND NEW.

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### SECTION 1.—DEFINITION.

**1395.** Extent is an old Scots law term, and means the annual value put on lands for the purpose of assessing public burdens and fixing the amount of relief and non-entry duties. There were two such values or extents—the old and the new. Sometimes the expression used was that of old and new retour, from the retour or verdict returned by the jury to the old brieve of inquest. These briefes of inquest, which were in use until 1847, contained, as one of the heads or questions on which the jury was to give a verdict, the question, “how much the said lands are now worth a year (new extent), and how much they were worth in the time of peace (old extent) (‘Quantum valent dictæ terræ et annui redditus cum pertinentibus nunc per annum et quantum valuerunt tempore pacis’).” The explanation now generally adopted, of how this head of the brieve of inquest came to be used, is that given by Lord Kames<sup>1</sup> and accepted by Erskine.<sup>2</sup> In early times “taxes were no part of the constitution of any feudal Government. The King was supported by the rents of his property-lands and by the occasional profits of superiority, passing under the name of casualties. These casualties, such as ward, non-entry, marriage, escheat, etc., arose from the very nature of the holding, and beyond these the vassal was not liable to be taxed—some singular cases excepted established by custom, such as for redeeming the King from captivity, for a portion for his eldest daughter, and a sum to defray the expense of making his eldest son a knight. For this reason it is natural to conjecture that the first universal tax was imposed upon some such singular occasion.”

### SECTION 2.—HISTORY.

**1396.** It is not known when such an occasion first arose; but a general tax was raised in 1281, during the reign of Alexander III., in order to provide a marriage portion for his daughter Margaret on the occasion of her marriage with Eric, King of Norway. After the death of

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GENERAL AUTHORITIES.—Kames, *Hist. Law Tracts*, xiv. ; Ersk. *Inst.* ii. 5, 31–4; Wight on Elections, 160; Bell on Elections, 154; Duff, *Feudal Conveyancing*, 462.

<sup>1</sup> Kames, *ut supra*.

<sup>2</sup> Ersk. *Inst.* ii. 5, 31.

Alexander III. there occurred the War of Independence, during which the country was devastated by the English. Subsequently, in 1326, in order to grant an aid to the King, Robert the Bruce, Parliament agreed to give him for his life a tenth penny of all the rents of the country according to the old extent of the lands and rents in the time of Alexander III. From this it is conjectured that the extent of 1281 is the old extent of the retour. This is confirmed by the circumstance that the agreement of 1326 contained a provision that in lands which had suffered in the war the proprietors were to be allowed such an abatement of the subsidy as should be settled by an inquest. It is to this revaluation that the term new extent was first applied. It is also generally believed that until 1326 retours contained only one extent. If this be so, we see a good reason for the double inquiry in the brieve, for the clause "*quantum nunc valent*" would in the case of many lands be different from that previously made *tempore pacis*. The new extent would thus naturally at first be much less than the old extent; and we find that this was so.

**1397.** The next occasion, or at any rate an occasion on which a general tax was again imposed—for a similar tax seems to have been imposed in 1365—was that raised to pay the King of England the amount due him for the maintenance of King James I. The amount was raised by Parliament in 1424, and it is clear from extant retours made at that date that two extents were given. Extant retours also shew that for a long time after the valuation of 1326 the new extent continued to be less than the old. This came to be considered a grievance, on account of the great rise in the value of land; and accordingly the Act, 1475, c. 55, was passed. It enacted: "Anent the brieves of inquest to be served in time to come. It is statute and ordained that it be answered in the retour quhat the land was of availe of the auld and the very availe it was worth and gives the day of the serving of the said brieve." From this time at any rate there is no ground for conjecture as to what the old extent means, for the old extent in all retours is certainly the old extent referred to in this statute. And for the reasons already given, the old extent in retours was probably the one made in the reign of Alexander III., and never altered afterwards. The new extent, so far as it practically affected feudal casualties, was really introduced by this statute. Land had come to be far above the value of the former new extents, and accordingly in retours since 1474 it is always higher than the old extent. It is true that the rule contained in the statute did not long continue to be observed; for after land had been once valued by an inquest (and it generally was valued at quadruple the old extent) the extent thus ascertained was ever after inserted in the retour as the new extent, which, though much higher than the old extent, was yet short of the true value.

**1398.** The old extent might, after this date, have ceased to appear in retours, were it not that conveyancers were averse to alter the style of the brieve. It continued, however, to be of importance for two

reasons, namely: (1) Public burdens continued to be raised on land according to the old extent, a certain proportion being imposed on the lands of *A.*, being the forty-shilling land of old extent, and a certain proportion on the lands of *B.*, being the five-merk land of old extent, and so on. This continued to be the rule until the valued rent was finally introduced by the Act of Convention of 1667. (2) Until the Reform Act of 1832 only those were entitled to be enrolled as electors and to vote at elections in counties in Scotland who were “publicly infeft in property or superiority and in possession of a forty-shilling land of old extent,” or, where the old extent could not be proved, infeft in lands worth four hundred pounds of valued rent.<sup>1</sup> During this period many cases affecting the old extent are to be found in Morison *voce* “Member of Parliament.” They are, however, now of only antiquarian interest. Since 1832 the old extent has ceased to have any importance.

**1399.** The new extent, on the other hand, was the value taken in fixing the casualties of non-entry and relief due prior to citation, and it was to prevent these being too heavy that the Act of 1475, c. 55, came, as already noticed, to be evaded. The new extent was never of any interest in lands held feu, for the feu-duty was the new extent. But it continued to be of importance in the case of lands held ward and blench.

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<sup>1</sup> Act, 1681, c. 21.

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## EXTENT, WRIT OF.

*See* CROWN; EXCHEQUER.

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## EXTERRITORIALITY.

*See* INTERNATIONAL LAW.



# EXTORTION.

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### SECTION 1.—DEFINITION.

**1400.** Extortion is the forcing of a person's will by violence or unlawful threats to undertake an obligation or to forego a benefit. Extortion lies at the root of the issue of "force and fear" or "duress" as it is called in English law. "Although, translating the language of the Roman law, we couple together force and fear as one ground of reduction, the act of force is truly, as Lord Stair observes (i. 9, 8), only one means of inducing fear, the true ground of reduction being extortion through the influence of fear, induced in the various ways of which he gives instances, partly from the civil law and partly from our own law, such as the fear of torture, fear of infamy, fear of danger to life."<sup>1</sup>

### SECTION 2.—IS TRANSACTION VOID OR MERELY VOIDABLE?

**1401.** According to the text-writers, obligations which are obtained by extortion are not merely voidable at the instance of the injured party but are *ab initio* void on the ground that coercion excludes consent.<sup>2</sup> "Force and fear annul engagement, when not vain or foolish fear, but such as to overcome a mind of ordinary firmness."<sup>3</sup> It is a question for the jury whether in the circumstances the engagement was *de facto* extorted by coercion.<sup>4</sup>

**1402.** On the question of whether an obligation obtained by extortion is void or merely voidable the decisions are not entirely consistent. If void, it should follow that it cannot be founded on by an innocent third party who has acquired right thereto. It was held in two old cases that a bill obtained by extortion is not enforceable by a holder in due course.<sup>5</sup> But in a modern case this was doubted.<sup>6</sup> So far as bills are concerned this question has been settled by the Bills of Exchange Act, 1882,<sup>7</sup> which includes force and fear among the defects of title which are not to affect a holder in due course, provided that he proves that he

<sup>1</sup> *Priestnell v. Hutcheson*, 1857, 19 D. 495, per Lord Deas at p. 499.

<sup>2</sup> Stair, i. 9, 8; Ersk., iii. 1, 16; iv. 1, 26; Bell's Prin., s. 12; Bell, Com: i. 314; Gloag on Contract, p. 546 *et seq.*; Gloag and Henderson, Introduction to the Law of Scotland, p. 68.

<sup>3</sup> Bell's Prin., s. 12.

<sup>4</sup> Bell, Com. i. 314; *Love v. Marshall*, 1870, 9 M. 291.

<sup>5</sup> *Willocks v. Callender*, 1776, Mor. 1519; *Wightman v. Graham*, 1787, Mor. 1521.

<sup>6</sup> *Gelot v. Stewart*, 1870, 8 M. 649, per Lord Neaves at p. 653. <sup>7</sup> 45 & 46 Vict. c. 61, s. 30.

has taken the bill in good faith and for value subsequent to the illegality. Averments by a wife that she had been coerced by her husband into signing as consentor to a disposition were held relevant against the disposer to elide the consent.<sup>1</sup> But in a recent case it was held that an averment that a compromise of a claim of damages by a woman against her employers was made under threats by her paramour was irrelevant, there being no suggestion that the employers were aware of or had any part in the coercion.<sup>2</sup>

### SECTION 3.—WHAT IS COERCION?

**1403.** Coercion may be of various kinds. It is undoubted that an obligation will not be enforced which has been granted in consequence of violence or serious threats of violence<sup>3</sup> or illegal detention or imprisonment or the threat of such.<sup>4</sup> If the threats are of illegal action, it is immaterial whether they are directed against the granter of the deed or obligation or against a near relative.<sup>5</sup> Where two sons granted a bond for the ransom of their father who had been carried off to a private prison, they were held entitled to the exception of extortion.<sup>6</sup> And where a person, wrongfully imprisoned on the expiry of a charge upon an extract registered protest of a bill, granted an assignation to the charger of his share in a business and also undertook not to sue the charger for damages for the illegal imprisonment, the undertaking was held to be of no effect.<sup>7</sup> Lord Young said: "I am of opinion that a transaction between the victim and author of unlawful imprisonment cannot be upheld. There is a fundamental difference between persons under legal restraint and persons under illegal restraint, and no transaction between the author and victim of illegal restraint can receive effect." So, too, if goods be seized unwarrantably, it would appear that an obligation undertaken by the owner with a view to obtaining their return would be reducible on the ground of extortion.<sup>8</sup> It has recently been held that averments of threats of loss of employment made by an employer, to induce a workman to settle a claim for damages made by him on behalf of his pupil child, were relevant as a ground of reduction of the settlement.<sup>9</sup>

**1404.** To make a contract voidable on the ground of force and fear the threatened action must be illegal and unwarrantable.<sup>10</sup> A creditor is entitled to use all lawful diligence and means of compulsion to obtain payment of his debt. Accordingly it is not extortion to obtain payment

<sup>1</sup> *Cassie v. Fleming*, 1632, Mor. 10279; cf. *Woodhead v. Nairn*, 1662, Mor. 10281.

<sup>2</sup> *Stewart Bros. v. Kiddie*, 1899, 7 S.L.T. 92.

<sup>3</sup> *Earl of Orkney v. Vinfra*, 1606, Mor. 16481; *Tenants of Winton v. Bakers of Canon-gate*, 1748, Mor. 16514; *Gelot v. Stewart*, 1870, 8 M. 649; 1871, 9 M. 1057.

<sup>4</sup> *Stuart v. Whitefoord*, 1677, Mor. 16489.

<sup>5</sup> *Priestnell*, *supra*; *M'Intosh v. Farquharson*, 1671, Mor. 16485; *Canison v. Marshall*, 1764, 6 Pat. 759; *Williams v. Bayley*, 1866, L.R. 1 (H.L.) 200.

<sup>6</sup> *M'Intosh v. Farquharson*, *supra*.

<sup>7</sup> *M'Intosh v. Chalmers*, 1883, 11 R. 8.

<sup>8</sup> *Wiseman v. Logie*, 1700, Mor. 16505.

<sup>9</sup> *Gow v. Henry*, 1899, 2 F. 48.

<sup>10</sup> *Dumfriesshire Education Authority v. Wright* (O.H.), 1926, S.L.T. 217; 1926, S.N. 11.

or fulfilment of an obligation under threat of diligence or even of imprisonment where that is still lawful. Before imprisonment for civil debt was abolished, it was held that it was not extortion to threaten a person with just imprisonment for the enforcement of an obligation.<sup>1</sup> To threaten A. with the justifiable imprisonment of B. would not ground an action of reduction at A.'s instance.<sup>2</sup> Thus where a wife signed deeds at her husband's request on being informed by him that he was in danger of imprisonment and would flee the country if she declined, it was held that she was not entitled to reduce.<sup>3</sup> And where a wife signed a deed under the influence of threats that, unless she did, her husband would be imprisoned for a civil debt, she was held bound.<sup>4</sup> So also a security granted for payment of his debt by a debtor lawfully imprisoned was not open to the exception of extortion.<sup>5</sup>

**1405.** An exception, however, was recognised where imprisonment or the threat of it was "applied to extort from a debtor something more than the debt for which imprisonment is competent."<sup>6</sup> A creditor is not entitled to extract from his debtor, by the fear or through the compulsion of imprisonment for one debt, a separate and independent obligation.<sup>7</sup> But the opinion has more than once been expressed that an obligation to repay money illegally appropriated is not open to exception merely because it has been granted to avoid prosecution.<sup>8</sup>

#### SECTION 4.—UNFAIR BARGAINS.

**1406.** According to the law of Scotland it is not a ground for reduction of a contract merely that its terms are unfair or extortionate, even if the party complaining be alleged to be greatly inferior in education or business experience to the other.<sup>9</sup> An exception was recognised at common law in the case of loans of money by a moneylender to a person without business experience.<sup>10</sup> Loans by moneylenders are now the subject of statutory regulation,<sup>11</sup> and the transaction may be reviewed and altered by the Court where it is found to be harsh and unconscionable. (See MONEY AND MONEYLENDERS.) In England bargains with expectant heirs might be avoided on the ground of inadequacy of price—but this doctrine has not been recognised in Scots law.<sup>12</sup>

<sup>1</sup> *Fraser v. Black*, 13th December 1810, F.C.; Bell, Ill. i. 8; *Rudman v. Jay & Co.*, 1908, S.C. 552, per Lord Ardwall.

<sup>2</sup> *Rutherford v. Murray*, 1698, Mor. 16502.

<sup>3</sup> *Priestnell v. Hutcheson*, 1857, 19 D. 495.

<sup>4</sup> *Craig v. Paton*, 1865, 4 M. 192.

<sup>5</sup> *Ker v. Edgar*, 1698, Mor. 16503; *Murray v. Spalding*, 1672, Mor. 16487.

<sup>6</sup> Bell, Com. i. 315.

<sup>7</sup> *Nisbet v. Stewart*, 1708, Mor. 16512; *Arratt v. Wilson*, 1718, Rob. App. 234; *Fraser v. Black*, 13th December 1810, F.C.; *M'Intosh v. Chalmers*, 1883, 11 R. 8.

<sup>8</sup> *Ferrier v. Mackenzie*, 1899, 1 F. 597; *Lamson Paragon Supply Co. v. Macphail*, 1914 S.C. 73.

<sup>9</sup> *Caledonian Rly. Co. v. North British Rly. Co.*, 1881, 8 R. (H.L.) 23, per Lord Blackburn; *North British Rly. Co. v. Wood*, 1891, 18 R. (H.L.) 27; *Mathieson v. Hawthorns & Co.*, 1899, 1 F. 468.

<sup>10</sup> *Young v. Gordon*, 1896, 23 R. 419; *Gordon v. Stephen*, 1902, 9 S.L.T. 397.

<sup>11</sup> 63 & 64 Vict. c. 51, and 17 & 18 Geo. V. c. 21.

<sup>12</sup> *M'Kirdy v. Anstruther*, 1839, 1 D. 855, per Lord Pres. Hope at p. 863.



# EXTRACT.

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## SECTION 1.—INTRODUCTORY.

### SUBSECTION (1).—*Definition of Extract.*

**1407.** A litigant who has been successful in a cause is entitled to have an official copy of the judgment in his favour, in order that he may enforce it and execute diligence against the unsuccessful party. Extract has been defined as "a certificate by the proper officer that a decree in the terms stated exists in the records of the Court."<sup>1</sup>

### SUBSECTION (2).—*Value of Extracts as Evidence.*

**1408.** An extract *ex facie* regular proves itself, the extract being by law presumed to be conform to the interlocutors and other warrants of it, and to be signed as required by law.<sup>2</sup> An extract may be challenged on specific grounds, such as that it is not conform to the decree on which it proceeds, or that it is wrongly dated or has been prematurely issued, but there is a presumption against this. Foreign extracts are held sufficient evidence by the law of Scotland if made in conformity with the laws of the state from which they come.

<sup>1</sup> *Inglis v. M'Intyre*, 1862, 24 D. 541, per Lord Justice-Clerk Inglis at p. 544.

<sup>2</sup> *Stair*, v.

## SECTION 2.—THE COURT OF SESSION.

SUBSECTION (1).—*The Extractor.*

**1409.** In the Court of Session extracts are issued and signed by the extractor, an officer of Court. An extract signed by the judge pronouncing the decree has been held to be bad.<sup>1</sup> No interlocutor can be extracted unless it is signed by the judge who pronounced it.<sup>2</sup> The Court of Session (No. 2) Act of 1838<sup>3</sup> provided that, instead of the duty of extracting the acts and decrees of the Court of Session being performed by extractors and engrossing clerks appointed by the Principal Clerks of Session during pleasure, the duty of preparing and superintending the preparation of extracts should be entrusted to one principal extractor to be appointed by the Crown, and that he should have an assistant who in his absence might subscribe and authenticate extracts. By the same Act the work of the extractor's office was placed under the direction and supervision of the Junior Principal Clerk of Session whose duties are now vested in the Principal Clerk of Session.<sup>4</sup>

SUBSECTION (2).—*Forms of Extracts.*

**1410.** Extracts used to be very lengthy documents, full of repetitions. In 1810 a Commission, which was appointed to consider the administration of justice in Scotland under the Court of Session Act, 1808,<sup>5</sup> reported *inter alia* that the form of extracts then in use consisted of making out a written copy of all the pleadings, manuscript and printed, in the process, with all the interlocutors and judgments of the Court following thereon; that a complete duplicate was made for preservation; and that extracts were drawn by an extractor and certified by one of the principal Clerks of Session.<sup>6</sup> Following the recommendations of the Commissioners, the Court of Session Act, 1810,<sup>7</sup> provided abridged forms of extract to be used in ordinary petitory actions and in certain special forms of process. The extracts contained the date of judgment, the names of parties, and a statement of the decree pronounced, and ordained letters of horning and all other execution. The warrant for diligence was a separate document. By the Debtors (Scotland) Act, 1838,<sup>8</sup> it was provided that all extracts of decrees in the Court of Session, Teind Court, and Court of Justiciary should contain warrant to arrest, charge, and poind; and Schedule No. 1 annexed to the Act gives a form of the warrant to be attached to extracts. It has been held in the House

<sup>1</sup> Balfour's Practicks, p. 389; *M'Dougal v. Prior*, 1623, Mocr. 12180.

<sup>2</sup> 1686, c. 3 (Record ed. c. 4).

<sup>3</sup> 1 & 2 Vict. c. 118.

<sup>4</sup> Clerks of Session (Scotland) Regulation Act, 1913 (2 & 3 Geo. V. c. 23), s. 1.

<sup>5</sup> 48 Geo. III. c. 151.

<sup>6</sup> Report of Commissioners appointed for inquiring into the Administration of Justice in Scotland, 2nd February 1910, p. 3; see also Stair, iv. 46, 27 and 28.

<sup>7</sup> 50 Geo. III. c. 112.

<sup>8</sup> 1 & 2 Vict. c. 114.

of Lords that this Act is directory, and not peremptory, as to the form of warrant.<sup>1</sup>

**1411.** The Court of Session (No. 2) Act, 1838,<sup>2</sup> also empowered the Court to make regulations by Act of Sederunt as to the form of extract, and these regulations are now contained in the Codifying Act of Sederunt, 1913.<sup>3</sup> It provides that it shall not be necessary for the extractor to repeat in the warrant the particulars already enumerated and ordained in the body of the extract. Schedule A annexed to the Codifying Act B, vi., prescribes the form of warrant. By the Codifying Act of Sederunt <sup>4</sup> it is also provided, in consequence of the abolition of imprisonment for civil debts, that the words “and imprisonment” shall be omitted from the warrant; but this does not apply to decrees for payment of taxes, fines, or penalties payable to His Majesty, or of rates and assessments lawfully imposed, or to extract decrees for payment of aliment, or to extract decrees *ad factum præstandum*.

**1412.** The following is an example of the present form of extract of a decree *in foro* in an ordinary petitory action, where there have been no complications, such as restricting the sum sued for or sisting new parties:—

At Edinburgh [*dates of decrees*].—In the summons and action instituted before the Lords of Council and Session at the instance of A. B. [*name and designation*], pursuer, against C. D. [*name and designation*], defender: After sundry procedure, in the course of which defences were lodged and the record was closed: Sitting in judgment the said Lords, of the first date hereof, having considered the cause, Decerned and Ordained, and hereby Decern and Ordain, the said C. D. to make payment to the said A. B. of the sum of £ , with interest [*as in conclusions of summons*], and found the said A. B. entitled to expenses as the same should be taxed by the auditor of Court, and remitted the account thereof when lodged to the said auditor to tax and report: And the said Lords, of the second date hereof, approved, and hereby approve, of the said auditor's report on the said account of expenses, and Decerned and Ordained, and hereby Decern and Ordain, the said C. D. to make payment to the said A. B. of the sum of £ , being the taxed amount of said expenses, and the sum of £ , being the dues of extract: And the said Lords grant warrant to messengers-at-arms, in His Majesty's name and authority, to charge the said C. D. personally, or at his dwelling-place, if within Scotland, and if furth thereof by delivering a copy of charge at the office of the Keeper of the Record of Edictal Citations at Edinburgh, to make payment of the foresaid sums of money, principal, interest, expenses, and dues of extract, all in terms and to the effect contained in the decree and extract above written, and here referred to and held as repeated *brevitatis causa*; And that to the said A. B., if the said C. D. be within Scotland, within fifteen days, if in Orkney or Shetland, within forty days, and if furth of Scotland, within fourteen days next after he is charged to that effect, under the pain of poinding; And also grant warrant to arrest the said C. D.'s readiest goods, gear, debts, and sums of money, in payment and satisfaction of the said sums, principal, interest,

<sup>1</sup> *Cleland v. Clason & Clark*, 1850, 7 Bell's App. 153.

<sup>2</sup> 1 & 2 Vict. c. 118, s. 33.

<sup>3</sup> C.A.S., B, vi. 1.

<sup>4</sup> C.A.S., B, vi. 2.



expenses, and dues of extract : And if the said C. D. fail to obey the said charge, then to poind his readiest goods, gear, and other effects ; and, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places, in form as effairs. Extracted upon ( ) pages by me [*extractor's name*], extractor in the Court of Session, at Edinburgh, this day of one thousand nine hundred and years.

[*Extractor's Signature.*]

### SUBSECTION (3).—*The Word "Decern."*

**1413.** No interlocutor finding sums due by one party to another, or appointing certain things to be done by one of the parties, can be extracted or enforced by diligence unless the word "decern" is contained in the interlocutor.<sup>1</sup> If it is a process of adjudication, the word "adjudge" is indispensable.<sup>2</sup> But it is sufficient if the word "decern" occurs once in the interlocutor, as it applies to all the findings in favour of either party.<sup>3</sup> In one case an application was made to have the word decern added to an interlocutor two years after the interlocutor had been pronounced. The Court added the word in order to enable the decree to be extracted.<sup>4</sup> "Acts" (which are interlocutors which do not contain any decerniture), if pronounced by the Inner House, may be extracted without abiding the reading in the minute-book.<sup>5</sup> Acts are now very uncommon, but are used in actions of choosing curators and some other forms of process. It is now the practice to put the word decern into all interlocutors which decide any question. In the regulations of the extractor's office it is provided: "All interlocutors, being acts and remits, or acts appointing factors, granting warrants for money or the like, should have the word 'decern' thereto, in order that a record copy of the appointment or warrant may be preserved."<sup>6</sup> An extract of an act does not contain a warrant for execution of diligence.

### SUBSECTION (4).—*Rules and Practice in Extractor's Office.*

**1414.** An extract may be either printed or in writing, or partly both,<sup>7</sup> and ought to specify the number of pages of which it consists.<sup>8</sup> It ought to mention at the end any deletions or marginal additions; or if they are not so mentioned, they should be initialed by the extractor.<sup>9</sup> The extractor must sign every page.<sup>10</sup> If a judgment has been pronounced some days before the interlocutor is signed, the extract should bear the date of signature. The extract should bear the date of the

<sup>1</sup> *Anderson v. Moon*, 1836, 14 S. 863; Beveridge, *Forms of Process* (1826), p. 628.

<sup>2</sup> Beveridge, *Forms of Process*, p. 628.

<sup>4</sup> *Laurie v. Donald*, 1833, 11 S. 246.

<sup>3</sup> *Greig v. Lamb's Trs.*, 1830, 8 S. 908.

<sup>5</sup> A.S., 11th July 1828, s. 116.

<sup>6</sup> Regulations, par. viii. (printed in the Parliament House Book).

<sup>7</sup> Debtors (Scotland) Act, 1838 (1 & 2 Vict. c. 114), s. 32.

<sup>8</sup> Tait on Evidence (3rd ed.), p. 191.

<sup>9</sup> Dickson on Evidence, s. 1290.

<sup>10</sup> *Fraser*, 1839, 2 Swin. 436.

interlocutor decerning for expenses as well as of the interlocutor disposing of the cause; but this is not absolutely necessary.<sup>1</sup> It is the practice in the extractor's office to mention in the extract the date of the decree for expenses, unless intimation is made to the extractor that the expenses have already been paid. If the Inner House has adhered *simpliciter* to the Lord Ordinary's judgment, its date is given. If the interlocutor is varied, or additional expenses are awarded in the Inner House, both dates are given. The same rule applies to cases which have been appealed to the House of Lords. In all cases, even where the decree is pronounced by a Lord Ordinary, the extract bears to be of a decree by the Lords of Council and Session. The Lord Ordinary is held to represent the Court.<sup>1</sup> The date on which the extract was completed must also be specified in the extract; but it is sufficient if the date is written below the extractor's signature, and not in the body of the deed.<sup>2</sup>

**1415.** The regulations in force in the extractor's office are given in detail in the Parliament House Book. When a process is transmitted for *interim* extract there must be sent (1) the record, (2) the interlocutor sheet, (3) any other necessary steps of process. If the principal copy of the summons has been lost, extract cannot issue except of consent;<sup>3</sup> but by the Court of Session Act, 1868, when a summons or other original writ has been lost, a copy thereof, proved and authenticated to the satisfaction of the Court, may be substituted for, and held equivalent to, the original for the purposes of the action.<sup>4</sup> This provision has been extended to the case of interlocutor sheets by s. 12 of Act of Sederunt, 20th March 1907.<sup>5</sup> For the previous practice, see *Cofton v. Cofton*,<sup>6</sup> and *Douglas*.<sup>7</sup>

**1416.** When a process is transmitted for final extract the process must be complete.<sup>8</sup> The Court may, however, ordain the extractor to dispense with production of a missing number of process and to grant extract.<sup>9</sup> A memorandum is sent with the process stating (1) the nature of the cause, the leading names of the parties, and the name of the Lord Ordinary or clerk from whose office the process is transmitted; (2) the date of the interlocutor or interlocutors of which extract is wanted; (3) whether the interlocutor is interim or exhausts the whole cause; (4) any peculiarity, such as change of party, sisting of new parties, qualification or restriction of claim. A copy of the interlocutor of which extract is desired must be sent, but not the opinion of the judge or judges. No extract will be issued until stamp duty has been paid. Productions in causes which are transmitted for final extract should

<sup>1</sup> *Thomson v. Macdonell*, 1841, 3 D. 1167.

<sup>2</sup> *Cleland v. Clason & Clark*, 1850, 7 Bell's App., 153.

<sup>3</sup> *Mair v. Inglis*, 1862, 24 D. 312.

<sup>4</sup> 31 & 32 Vict. c. 100; *Couper v. Bain*, 1869, 7 M. 1130.

<sup>5</sup> Now C.A.S., A, iii. 8.

<sup>6</sup> 1875, 2 R. 599.

<sup>7</sup> 1883, 20 S.L.R. 579.

<sup>8</sup> Notice by Junior Principal Clerk of Session, 11th July 1850, printed in Regulation I. for the Extractor's Office (Parliament House Book).

<sup>9</sup> *MacHardy v. Alexanders* (O.H.), 1909, 2 S.L.T. 117.

be taken up before transmission, as after extract no productions are given up by the extractor except upon a warrant from the Court.<sup>1</sup> In actions of constitution against unentered heirs, the extractor refuses to issue extract of decrees pronounced unless the defender has been duly charged by citation and execution to enter heir. A minute by the defenders, holding the summons as served, is not accepted as equivalent to such citation and execution.<sup>2</sup>

**1417.** A person is entitled to as many extracts of a decree in his favour as he may wish, but he can only get one at the expense of his opponent. There is no reason why an unsuccessful party should not get an extract of a decree against him if he desires it, and applications for extract under these circumstances are sometimes made. The extractor does not issue decree to an unsuccessful party till extract has been given out to the party in whose favour the decree is pronounced. A person who tenders payment of the sum decerned for in the decree, and the dues of extract, in order to stop diligence, is not entitled to demand that the extract should be delivered up to him.<sup>3</sup> If he does so, his tender of payment is not unconditional, and diligence may proceed.<sup>4</sup>

**1418.** Decrees against more debtors than one, and decrees of preference, may be extracted in part.<sup>5</sup> Accordingly, in multiplepoundings and actions of division and sale, the extractor will issue a part extract without authority from the Court. On the other hand, in petitions for authority to complete title the extractor is often asked to give out separate extracts relating to lands lying in different counties, but all dealt with in the one interlocutor. This the extractor declines to do unless with the authority of the Court.

#### SUBSECTION (5).—*When Extract may be Issued.*

**1419.** All acts or decrees of the Court of Session are extractable in twenty-four hours after the reading in the minute-book, that is, eight free days from the date of the interlocutor.<sup>6</sup> Acts (which are interlocutors which do not contain any decerniture) may be extracted immediately if pronounced in the Inner House,<sup>7</sup> but if they are pronounced in the Outer House extract cannot be given out till after the reading in the minute-book, unless the Lord Ordinary has dispensed with it and allowed immediate extract. The Lord Ordinary formerly could not dispense with reading in the minute-book in case of a decree, though he could in case of an act or order for diligence,<sup>8</sup> but now in practice it is done upon cause shewn. Decrees in absence cannot be

<sup>1</sup> Regulations for Extractors Office, III., IV., and V. (Parliament House Book).

<sup>2</sup> Memoranda by the Extractor (Parliament House Book).

<sup>3</sup> *Williams v. Carmichael* (O.H.), 1874, 11 S.L.R. 530.

<sup>4</sup> *Inglis v. M'Intyre*, 1862, 24 D. 541.

<sup>5</sup> Articles of Regulation concerning the Session, 29th April 1695, Art. 17.

<sup>6</sup> A.S., 16th January 1671.

<sup>7</sup> A.S., 11th July 1828, s. 116.

<sup>8</sup> Beveridge, Forms of Process, p. 628.



extracted till ten days after the interlocutor has been pronounced.<sup>1</sup> On the eighth day after the date of the judgment the process, if not borrowed for the purpose of reclaiming, is in the ordinary case transmitted to the extractor's office. When the process has been transmitted for extract, extract will be prepared and issued unless it is interdicted by a Lord Ordinary or the Court, or unless the clerk to the process intimates to the extractor that a reclaiming note has been presented.<sup>2</sup> Where an interlocutor has been appealed against to the House of Lords, the person holding the judgment of the Court of Session may present a petition for execution pending appeal, and the Division may, in its discretion, allow extract and execution to proceed under the interlocutor which is under appeal.

**1420.** An extract of a decree may be taken out any number of years after the decree has been pronounced; and to enable this to be done, it is not necessary that the action should be awakened.<sup>3</sup> In an action against two defenders, the Lord Ordinary assoltied one defender and found him entitled to expenses, and granted decree for a certain sum against the other. The pursuers reclaimed against this interlocutor, but intimated that they did not object to it in so far as it assoltied the one defender. He accordingly got his account of expenses taxed and decerned for; but the extractor refused to extract the interlocutor decerning for the expenses, on the ground that the process was in the Inner House. The Court granted authority to the extractor to issue extract.<sup>4</sup> So, also, where one of several defenders was assoltied of consent in the Sheriff Court and found entitled to expenses, but was unable to obtain extract of his decree for expenses through the case being remitted to the Court of Session, on the defender's motion the Court of new found him entitled to expenses and granted warrant for immediate extract.<sup>5</sup>

#### SUBSECTION (6).—*Interim Extract.*

**1421.** Extracts are either final or interim. Interim extract could formerly be issued only by special allowance of the judge or Court, but it was provided by the Court of Session Act, 1850, s. 28,<sup>6</sup> that all acts, warrants, and decrees granted during the dependence of a process, "and which, according to the present practice, might be extracted *ad interim*, if special allowance to that effect were granted," should be extractable *ad interim* without the necessity of such special allowance, unless the Lord Ordinary or the Court should otherwise direct. The wording of this section left it in doubt whether a decree, exhausting the merits of the case, could be extracted *ad interim* without special allow-

<sup>1</sup> Court of Session Act, 1868 (31 & 32 Vict. c. 100), s. 23.

<sup>2</sup> A.S., 21st December 1822.

<sup>3</sup> Watson's Forms of Process (2nd ed.), p. 315; *MacHardy v. Alexanders* (O.H.), 1909, 2 S.L.T. 117; see also *M'Lachlan v. Campbell*, 1846, 8 D. 574.

<sup>4</sup> *Ayr Road Trs. v. W. & T. Adams*, 1883, 10 R. 1295.

<sup>5</sup> *Gavin v. Henderson & Co.*, 1910 S.C. 357.

<sup>6</sup> 13 & 14 Vict. c. 36.

ance. It has now been decided that such a decree may be extracted *ad interim*, and if so extracted, with or without special leave given by the Court, it will not be treated as a final extract to the effect of barring the pursuer from obtaining decree for the taxed amount of expenses.<sup>1</sup> In the case of *Crichton Brothers v. Crichton*,<sup>2</sup> a majority of the Court were also of opinion that such an extract will not bar a reclaiming note. In petitions for appointment of a judicial factor or *curator bonis*, and subsequent notes and petitions in the factory, all extracts are interim, including extract of a decree discharging the representatives of a deceased factor. The only final extract in such a process is the extract of the decree discharging the factor when his ward has died, or when the factory is brought to an end.

SUBSECTION (7).—*Power to Supersede Extract.*

1422. The Court has power to supersede extract till some condition or qualification of the decree shall have been implemented. For instance, a decree may bear that it is not to be extracted till caution has been found, or till a sum has been consigned, or till something has been done. Extract is often superseded till executors have obtained confirmation. A motion to supersede extract is sometimes made in order that the party against whom decree has been pronounced may gain time in which to make good a counter-claim to compensate the sum found due by him in the decree. Such a motion will not readily be granted.<sup>3</sup> Where a pursuer in an action for damages obtained decree for a smaller sum than had been tendered by the defenders, and was found liable in expenses from the date of the tender, the Court superseded extract of the decree for the damages until the defenders obtained decree for their expenses.<sup>4</sup> In one case in which there was no person qualified to act as returning officer at an election of magistrates which was due to take place within two days, the Court named a sheriff-substitute to act, and superseded extract.<sup>5</sup> One of some fifty actions of damages arising out of a collision at sea was raised in the Sheriff Court, and, having been remitted to the Court of Session for jury trial, was decided while the other actions were at *avizandum* in the Outer House. The pursuer moved for the verdict to be applied, and the defenders moved the Court to supersede extract until the other actions had been decided, as it was their intention in the event of adverse decisions to present a petition to have their liability limited under s. 504 of the Merchant Shipping Act, 1894. The Court ordered extract to be superseded for one month.<sup>6</sup> Where extract has been superseded,

<sup>1</sup> *Crichton Brothers v. Crichton*, 1901, 4 F. 271; *Beveridge v. Liddell & Co.*, 1852, 14 D. 772; *Taylor v. Jarvis*, 1860, 22 D. 1031; *Baillie v. Cameron*, 1891, 28 S.L.R. 895.

<sup>2</sup> *Supra*.

<sup>3</sup> *Lawson v. Drysdale*, 1844, 7 D. 153; *Thomson v. Duncan*, 1855, 17 D. 1081.

<sup>4</sup> *Fry v. North-Eastern Railway Co.*, 1882, 10 R. 290; *Wilson v. Dick's Co-operative Institutions* (O.H.), 1916, 1 S.L.T. 312; *Bruce v. M'Lellan*, 1925 S.C. 103.

<sup>5</sup> *Muirhead*, 1886, 14 R. 18.

<sup>6</sup> *MacLean v. Clan Line Steamers*, 1925 S.C. 256.

it is the duty of the clerk to the process not to transmit for extract till the conditions have been implemented.

SUBSECTION (8).—*Expenses of Extract.*

**1423.** The successful litigant is entitled to extract at the expense of his opponent.<sup>1</sup> And the expense of extract is decerned for in the extract. The expenses of extract must be tendered if the expense of approving of the Auditor's report is to be saved.<sup>2</sup> In the case of a decree in absence it is incompetent to extract a decree for the random sum of expenses concluded for in the summons. An account is lodged, and decree is extracted for the amount as taxed by the Auditor.<sup>3</sup> If, after a process has been transmitted for extract, a rec'aiming note is presented and intimation of it is made to the extractor, the extractor retransmits the process whenever he has been paid the expense which has actually been incurred. This payment is made without prejudice to any question as to who must ultimately bear the burden thereof.<sup>4</sup>

**1424.** The fees due on extracts are as follows:—(1) Extract of decree in absence, £1 or £1, 10s., according to circumstances. (2) Extract of decree *in foro*, £1, 10s. These fees are payable only on the first extract issued; upon subsequent copies only copying fees are chargeable. (3) Extract of admission as a law agent, 10s. 6d. (4) Extract of protestation, 10s. 6d. (5) Certificate under Judgments Extension Act, 5s. To these fees is added a charge of 2s. per sheet for engrossment of extract, record copy, and certificate. Figured work is 1s. extra per sheet.<sup>5</sup>

SUBSECTION (9).—*Extracted and Unextracted Processes.*

**1425.** When a process has been sent to the extractor's office for interim extract, it is retransmitted to the clerk to the process whenever the interim extract has been issued. After the extractor has issued final extract in any cause, the process is out of Court, and the extractor transmits it to the General Record Office under the charge of the Lord Clerk-Register. Processes are kept in the extractor's office for about a year after an extract is issued, and two or three times annually the processes which have accumulated in the extractor's office are transmitted. A copy of every extract issued is engrossed in the books of the extractor. The Court of Session Act, 1821, s. 23,<sup>6</sup> empowered the Court to make an Act of Sederunt dealing with unextracted processes. This matter is now dealt with in the Codifying Act of Sederunt,<sup>7</sup> which provides that all unextracted processes should be transferred to the custody of the Lord Clerk-Register; that a process should be trans-

<sup>1</sup> *Hunter v. Stewart*, 1857, 20 D. 60; *Rutherglen Parish Council v. Glenbucket and Dalziel Parish Councils* (O.H.), 1896, 33 S.L.R. 368.

<sup>2</sup> *Scott v. North British Railway Co.*, 1860, 22 D. 922; *Orr v. Smith* (O.H.), 1891, 28 S.L.R. 589.

<sup>3</sup> Court of Session Act, 1821 (1 & 2 Geo. IV. c. 38), s. 33.

<sup>4</sup> C.A.S., C, ii. 15.

<sup>5</sup> A.S., 20th July 1922.

<sup>6</sup> 1 & 2 Geo. IV. c. 38.

<sup>7</sup> C.A.S., A, v.



missible one year after the date of the last interlocutor or calling; that it should be the duty of the Clerks of Court to transmit; that the transmitted processes should be arranged and indexed; that persons having interest should be entitled to access to, and exhibition of, unextracted processes; that processes might be retransmitted to the Clerks of Court if required; that no process or part of process might be borrowed from the Lord Clerk-Register's Office; that he and his deputes should issue certified copies of interlocutors or steps of process; that any person having in his hands a step in a process which had been transmitted to the Lord Clerk-Register might return the said step, and that it should be put up with the process.

SUBSECTION (10).—*Errors in Extract.*

1426. If there is an error in an extract the Court may, on a petition to the Inner House,<sup>1</sup> recall it, or order it to be corrected, and this has been done two years after the extract had been issued.<sup>2</sup> It has been held that it is beyond the power of a judge of an inferior Court to correct an extracted decree which has been pronounced by him;<sup>3</sup> but a Lord Ordinary was found entitled, on a note being presented to him, to order a clerical error in an extract, as to the designation of one of the parties, to be corrected.<sup>4</sup> Where the materials are found in the process for the correction of an error in a decree, the extractor himself may put the matter right in the extract.<sup>5</sup> If there is a mistake in an extract, a new one can always be issued.

SUBSECTION (11).—*When Extract unnecessary.*

1427. By the Court of Session Act, 1850,<sup>6</sup> s. 25, it was provided that it is unnecessary to extract an interlocutor granting a commission or diligence, and that a copy of the interlocutor, certified by the clerk or his assistant, shall have the same force and effect as a formal extract. A certified copy of an interlocutor fixing a trial is sufficient warrant for citing witnesses and havers.<sup>7</sup> By the Bankruptcy (Scotland) Act, 1913,<sup>8</sup> s. 170, deliverances under the Act, purporting to be signed by the Lord Ordinary or other judge or sheriff, or copy purporting to be signed or certified by any Clerk of Court, shall be judicially noticed by all Courts and judges in Her Majesty's dominions, and shall be received as *prima facie* evidence without the necessity of proving their authenticity or correctness, or the signatures appended, or the official

<sup>1</sup> *Minister and Kirk-session of Borrowstownness*, 1764, 5 Br. Supp. 425.

<sup>2</sup> *Brown*, 1840, 2 D. 1467; *Dickson on Evidence*, s. 1296; *Hope v. Hamilton*, 1851, 13 D. 1268; *Scott*, 1855, 17 D. 932; *Small's Trs.*, 1856, 18 D. 1210; *M'Kellar*, 1856, 19 D. 34; *Smith & Turnbull*, 1891, 29 S.L.R. 137; see also *Connal and Leishman*, 1853, 2 Stuart, 428.

<sup>3</sup> *Edington & Sons v. Astley*, 1829, 8 S. 192.

<sup>4</sup> *Miller v. Lindsay*, 1850, 12 D. 964; *Clark & Macdonald v. Bain*, 1895, 23 R. 102.

<sup>5</sup> *Henderson v. Cullen*, 1860, 22 D. 712.

<sup>6</sup> 13 & 14 Vict. c. 36.

<sup>7</sup> *Ibid.*, s. 43.

<sup>8</sup> 3 & 4 Geo. V. c. 20.

character of the person signing, and shall be sufficient warrants for all diligence and execution by law competent. So also by s. 70 a certified copy of the act and warrant in favour of the trustee is sufficient *prima facie* evidence to give him a title to sue. By the Exchequer Court (Scotland) Act, 1856,<sup>1</sup> s. 27, certified copies of interlocutors in Exchequer causes are equivalent to extracts, except in order to diligence.

SUBSECTION (12).—*Extracts of Verdicts of Juries.*

**1428.** Since the abolition of the Jury Court, the verdict of a jury which is applied by the Court of Session is extracted in the same way as any other decree.

SUBSECTION (13).—*Extracts of Protestation.*

**1429.** When there has been a protestation for delay in calling a summons, the note of protestation may be extracted on the expiry of nine free days from its date, the time for reading in the minute-book having expired.<sup>2</sup> No warrant for extract of a protestation can be obtained except on a sederunt day. Thus, if the nine free days expire on a Sunday or Monday, the warrant for extract cannot be obtained till the Tuesday. The extract decerns for £3, 3s. of expenses.<sup>3</sup> In the Sheriff Court protestation cannot be extracted till the expiry of seven free days from the date of its granting, except where arrestments have been used, in which case extract may be given out after the lapse of forty-eight hours. Upon protestation being extracted the instance falls.<sup>4</sup>

SECTION 3.—THE COURT OF EXCHEQUER.

**1430.** By the Exchequer Court (Scotland) Act, 1856,<sup>5</sup> s. 28, it was provided that all decrees pronounced by the Divisions of the Court of Session, sitting as the Court of Exchequer, should be extracted by the extractor of the Court of Session, without abiding the expiration of the days of the minute-book. Extracts in Exchequer causes take precedence of other business in the extractor's office. The extract is in ordinary form, but Schedule G attached to the Act gives a special form of warrant, to be subjoined to extracts of Exchequer decrees in favour of the Crown. Such extract is sufficient warrant to any messenger-at-arms or sheriff-officer to execute charge, arrestment, and pinding in terms thereof.

SECTION 4.—THE COURT OF TEINDS.

**1431.** Extracts of decrees in the Teind Court are issued by the Clerk of Teinds. The Court of Session Act, 1810,<sup>6</sup> which introduced short

<sup>1</sup> 19 & 20 Vict. c. 56.

<sup>2</sup> Beveridge, *Forms of Process*, i. 272; see also *Lee v. Smith & Maclaren* (O.H.), 1897, 4 S.L.T. 323.

<sup>3</sup> Court of Session Act, 1850 (13 and 14 Vict. c. 36), s. 23.

<sup>4</sup> Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), First Schedule, Rules 37 and 38.

<sup>5</sup> 19 & 20 Vict. c. 56.

<sup>6</sup> 50 Geo. III. c. 112.

extracts in the Court of Session, was applied to extracts in the Teind Court, except in processes of valuation of teinds, by the Court of Session (No. 2) Act, 1838,<sup>1</sup> s. 27, and the form of extracts is regulated by these Acts, and by the Debtors (Scotland) Act, 1838, s. 1,<sup>2</sup> and by the Codifying Act of Sederunt, H, ii. 26. The schedule to this section of the Codifying Act of Sederunt supplies the form now in use of extracts of decreets of modification and locality and the warrant to charge. By the Act of Sederunt, 11th June 1707 (which is not printed), it was provided that no decree could be extracted till the "Lords shall have mett another dyet after pronouncing thereof." This was changed by Act of Sederunt, 7th February 1821, which provided that if an interlocutor became final in vacation, and no reclaiming note was lodged on the box-day, extract might be given out.<sup>3</sup> Fourteen days is the time after which extracts are now issued in ordinary teind cases, but eight days in processes of locality. The Act of Queen Anne, 1707, c. 9,<sup>4</sup> provided that new extracts should be given out to persons presenting to the Teind Court any authentic extract from the former records of the Court, many of which had been lost. The old extract was recorded and preserved by the Lord Clerk-Register, and the new one was given out gratis. The extract is given on petition to the Teind Court.<sup>5</sup>

#### SECTION 5.—THE BILL CHAMBER.

**1432.** Extracts in the Bill Chamber are issued not by the extractor, but by the Bill Chamber Clerk. This applies only to proper Bill Chamber work. In petitions as to factories, etc., which, under the Clerks of Session (Scotland) Regulation Act, 1889,<sup>6</sup> s. 3, go before the Junior Lord Ordinary and appear in his Bill Chamber Roll, the extracts are given out by the extractor; but decrees in suspensions and interdicts, before they go to the Court of Session, and in certain sequestration processes, are extracted by the Clerk to the Bills.<sup>7</sup> The Codifying Act of Sederunt, which empowers the Lord Ordinary on the Bills to pronounce a final judgment and decern for the taxed amount of expenses in a note of suspension, interdict, suspension and interdict, or suspension and liberation, where no appearance has been entered and no answers have been lodged, provides that the interlocutor and process may be transmitted to the office of the Extractor of the Court of Session, and there dealt with in the same way as if it were an interlocutor and process in the Court of Session.<sup>8</sup>

#### SECTION 6.—THE HIGH COURT OF JUSTICIARY.

**1433.** Extracts in the High Court of Justiciary are, by immemorial practice, issued by the Clerk of Court. They are similar in their form to

<sup>1</sup> 1 & 2 Vict. c. 118.

<sup>2</sup> 1 & 2 Vict. c. 114.

<sup>3</sup> Elliot on Teinds, p. 100.

<sup>4</sup> Record Ed., 1706, c. 10.

<sup>5</sup> See Juridical Styles (3rd ed.), iii. 879.

<sup>6</sup> 52 & 53 Vict. c. 54.

<sup>7</sup> C.A.S., E, ii. 27.

<sup>8</sup> C.A.S., E, ii. 25.



extracts in the Court of Session. The dues of extract are decerned for in the interlocutor of the Court. Extracts are issued immediately after decree, on application being made to the clerk. In criminal cases, extracts of the sentences pronounced are given out by the Clerks of Court immediately after sentence. The extract is the warrant to the prison authorities to remove the prisoner to the prison and to detain him there, or otherwise to carry out or enforce the orders of the Court. By the Summary Jurisdiction (Scotland) Act, 1908,<sup>1</sup> s. 56, it is provided that an extract in the form contained in Schedule E of the Act shall not be void or liable to be set aside on account of any error or defect in point of form.

#### SECTION 7.—THE SCOTTISH LAND COURT.

**1434.** Sec. 119 of the Rules of the Scottish Land Court<sup>2</sup> provides that all extracts of orders by the Court required for the purpose of being used as any proceeding before any Court of law, arbiter, public department, or any public authority whatever, shall be authenticated by the signature of the Chairman, or of the principal Clerk, and sealed with the seal of the Court before being issued from the office.

#### SECTION 8.—THE SHERIFF COURTS.

##### SUBSECTION (1).—*The Form of Extracts.*

**1435.** The form of extracts in the Sheriff Court was regulated by the Act of Sederunt, 27th January 1830, abridged forms being contained in Schedule C, and by the Debtors (Scotland) Act, 1838,<sup>3</sup> s. 9, which enacted that the extract should contain a warrant to charge. The form of warrant was modified by Act of Sederunt, 8th January 1881, which was passed after imprisonment for civil debt was abolished. The old forms prescribed in 1830 were used till 1892, when the Sheriff Courts (Scotland) Extracts Act, 1892,<sup>4</sup> which now regulates the matter, was passed. That Act simplified and abridged the extracts of decrees in the Sheriff Court, and a schedule contains abbreviated forms suitable to various classes of actions. The Act also provided that it was not necessary that the word “decern” should occur in a decree in order to allow it to be extracted.<sup>5</sup> The short form of warrant in the extract is: “And the Sheriff grants warrant for all lawful execution hereon by instant arrestment, and also by poinding after a charge of seven free days.”<sup>6</sup> Sec. 7 provides what the import of the short form of warrant is to be in different circumstances. In one case an interlocutor by a Sheriff ordered consignation of a sum of money, but did not state the time within which consignation was to be made. The extract contained a warrant to charge on seven days’ *induciae*. This was held to be good

<sup>1</sup> 8 Edw. VII. c. 65.

<sup>4</sup> 55 & 56 Vict. c. 17.

<sup>2</sup> S. R. & O., 1912, No. 1750.

<sup>5</sup> Sec. 4.

<sup>3</sup> 1 & 2 Vict. c. 114

<sup>6</sup> Schedule, Form 1.

because s. 7 (2) of the Act provides that in such a case a charge may be given to perform the act "within the appropriate days of charge," and the appropriate days appear from Form 12 of the Schedule to be seven.<sup>1</sup>

**1436.** The provisions of this Act apply to decrees pronounced prior to its passing,<sup>2</sup> but any person entitled to an extract may demand from the Sheriff-Clerk a full extract in the older form.<sup>3</sup> It was also provided that no extract shall be held invalid on account of form, if it be sound in substance.<sup>4</sup> By s. 2 the Act does not apply to proceedings in the Sheriff's Small Debt Court or to summary ejections under the Sheriff Courts (Scotland) Act, 1838, ss. 8 to 13,<sup>5</sup> or to commissary or executry proceedings, or proceedings for service of heirs, or completing titles, or to proceedings under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881.<sup>6</sup> The Court of Session has power to pass Acts of Sederunt to give full effect to the purposes of the Act.<sup>7</sup> A Sheriff Court extract, unlike one issued in the Court of Session, cannot be amended,<sup>8</sup> but if an extract is defective another may be obtained.

#### SUBSECTION (2).—*The Issue of Extracts.*

**1437.** In the Sheriff Court extracts are granted by the Sheriff-Clerk. The time after which judgments may be extracted is regulated by the Sheriff Courts (Scotland) Act, 1907,<sup>9</sup> First Schedule, rules 24, 85, and 98. Rule 85 provides that "extract of any decree, interlocutor, or order of the Sheriff (other than a decree in absence or a decree for expenses), if the same shall not have been sooner appealed against, may be issued in a summary cause after the lapse of seven days; and in any other cause after the lapse of fourteen days from its date, or at such earlier date as the Sheriff shall allow extract." Allowance of extract upon caution being found does not shorten the time for extracting, but only adds a condition.<sup>10</sup> Rule 24 provides that the Sheriff-Clerk may issue an extract of a decree in absence after the expiry of seven days from the date of the Sheriff's judgment; and rule 98 provides that extract of a decree for expenses may be issued after the lapse of seven days unless otherwise directed by the Sheriff. The decree for expenses includes decree for the expense of extract.<sup>11</sup> It has been held that interim extract of a decree disposing of the merits of a cause will not preclude the successful party from obtaining and charging on a decree

<sup>1</sup> *M'Lintock v. Prinzen & Van Glabbeek*, 1902, 4 F. 948; *Hardie v. Brown, Barker & Bell* (O.H.), 1907, 15 S.L.T. 539.

<sup>2</sup> Sec. 10.

<sup>3</sup> Sec. 6.

<sup>4</sup> Sec. 11.

<sup>5</sup> 1 & 2 Vict. c. 119, since repealed by the Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. c. 51), s. 52, and Second Schedule.

<sup>6</sup> 27 & 28 Vict. c. 53 and 44 & 45 Vict. c. 33, since repealed by the Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 3 and Schedule A.

<sup>7</sup> Sec. 13.

<sup>8</sup> *Edington & Sons v. Astley*, 1829, 8 S. 192; *Dickson on Evidence*, s. 1296; but compare the Sheriff Courts (Scotland) Extracts Act, 1892, s. 11.

<sup>9</sup> 7 Edw. VII. c. 51.

<sup>10</sup> *Simpson v. Jack*, 1888, 16 R. 131.

<sup>11</sup> Rule 98.

for the taxed amount of the expenses.<sup>1</sup> To enable the Clerk of Court to issue an extract, the material parts of the process must be in his hands. When any number of process is lost or destroyed, a duly authenticated copy may be substituted, and is for all purposes equivalent to the original.<sup>2</sup>

SUBSECTION (3).—*Extracts in the Small Debt Courts.*

**1438.** The form of extract of a decree in the Small Debt Court is regulated by s. 13 of the Small Debt (Scotland) Act, 1837,<sup>3</sup> and Schedule A, No. 7. The extract is written or printed on the summons, and contains a warrant for instant execution by arrestment, and for execution by poinding and sale and imprisonment, if competent, after ten free days if the defender or person against whom judgment is given was present in person when the decree was pronounced, or otherwise after a charge of ten free days. The words “and imprisonment” in the form in the schedule were repealed by the Statute Law Revision Act, 1892,<sup>4</sup> but were re-enacted by the Statute Law Revision Act, 1894, s. 3.<sup>5</sup> The form of charge on the decree provided by the Small Debt (Scotland) Act, 1837, Schedule A, No. 11, while specifying poinding and sale as penalties for non-implement, made no mention of imprisonment. Where the decree was in favour of the defender, and the pursuer had not returned the original summons, the extract might be written on the defender’s copy, and where several defenders were successful they might have extracts written on their copies. The Small Debt Amendment (Scotland) Act, 1889,<sup>6</sup> s. 12, provided that any party to a cause, or any claimant in a multiplepoinding, or the agent of any such party or claimant might, on payment of a fee of one shilling, obtain from the Clerk of Court an extract of the decree pronounced in the cause to the extent of his interest therein. Sec. 13 provided that the extract authorised by the Act might be written either on the copy of the principal summons or separately in the form, as nearly as might be, of Schedule C, and for the purpose of enforcing the decree, or the part thereof contained in the extract, such extract should have the like force and effect as if it had been made on the principal summons. The Act also provided in Schedule B a form of extract where the summons was for the delivery of a specific subject. In Schedules B and C the warrant is simply for “all lawful execution.” The Sheriff Courts (Scotland) Act, 1907, s. 47, provided that a second or further extract of any decree under the Small Debt Acts might be issued in the form of Schedules B or C of the Small Debt Amendment (Scotland) Act, 1889, which extract might be written upon a separate paper. This provision appears to be intended to meet the case of an original summons with extract decree thereon being lost.

<sup>1</sup> *Tennents v. Romanes*, 1881, 8 R. 824; *Mackintosh v. Young* (O.H.), 1886, 23 S.L.R. 634.

<sup>2</sup> Rule 17.

<sup>3</sup> 7 Will. IV. and 1 Vict. c. 41.

<sup>4</sup> 55 & 56 Vict. c. 19.

<sup>5</sup> 57 & 58 Vict. c. 56.

<sup>6</sup> 52 & 53 Vict. c. 26.



## SECTION 9.—THE CHURCH COURTS.

**1439.** In Church Courts extracts are issued by the Clerks of Assembly or Synod or other Court. Extracts so granted are probative, except in the case of Dissenting Churches. Extracts of the proceedings of their Courts are not admitted, as their official character is not recognised.<sup>1</sup>

## SECTION 10.—SCOTTISH EXTRACTS OF JUDGMENTS OF BRITISH COURTS FORTH OF SCOTLAND.

SUBSECTION (1).—*Under the Judgments Extension Act, 1868.*

**1440.** Where judgment has been obtained in the Courts at Westminster a certificate of the judgment registered in Scotland has the effect of a decree of the Court of Session, and all proceedings can be taken on extract of the certificate as if the certificate had been a decree originally pronounced by the Court of Session. A certificate cannot be registered after twelve months from the date of the judgment, unless leave is obtained from the Lord Ordinary on the Bills.<sup>2</sup> These provisions formerly applied to judgments of the Courts at Dublin, and on the establishment of the Supreme Court of Judicature of Northern Ireland by the Government of Ireland Act, 1920,<sup>3</sup> existing enactments relating to the Supreme Court of Judicature in Ireland were applied to the Court at Belfast.<sup>4</sup> Since the passing of the Irish Free State Constitution Act, 1922 (Session 2),<sup>5</sup> the Judgments Extension Act, 1868,<sup>6</sup> has ceased to apply to the Supreme Court at Dublin.<sup>7</sup> The *induciae* of a charge in the extract of such a certificate is fifteen days.<sup>8</sup> The fees for extracting certificates of English and Irish judgments are 2s. per sheet, 1s. extra per sheet for figured and display work, and 10s. per hour extra for ancient, foreign, or difficult script.<sup>9</sup> A creditor who holds a judgment of the High Court of Justice in England is entitled to register it in Scotland and do diligence upon it although the debtor is not subject to the jurisdiction of the Scottish Court.<sup>10</sup> The Court of Session, though unable to suspend the decree on the merits, can sist diligence in Scotland until the complainer has had an opportunity of applying to the foreign Court for arrest of the judgment.<sup>11</sup>

<sup>1</sup> *Mathers v. Laurie*, 1849, 12 D. 433.

<sup>2</sup> Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 2.

<sup>3</sup> 10 & 11 Geo. V. c. 67.

<sup>4</sup> *Ibid.*, s. 41 (1).

<sup>5</sup> 13 Geo. V. c. 1.

<sup>6</sup> 31 & 32 Vict. c. 54.

<sup>7</sup> *Wakeley v. Triumph Cycle Co.*, [1924] 1 K.B. 214; *Cooney v. Dunne*, 1925, S.L.T. 22.

<sup>8</sup> C.A.S., B, vi. 5 (a).

<sup>9</sup> A.S., 20th July 1922.

<sup>10</sup> *English's Coasting and Shipping Co. v. British Finance Co.*, 1886, 14 R. 220.

<sup>11</sup> *Wotherspoon v. Connolly*, 1871, 9 M. 510; *Wilson v. Robertson*, 1884, 11 R. 893.

SUBSECTION (2).—*Under the Administration of Justice Act, 1920.*

**1441.** When a judgment has been obtained in a superior Court in any part of His Majesty's dominions outside the United Kingdom to which Part II. of the Administration of Justice Act, 1920<sup>1</sup> has been extended by Order in Council, the judgment creditor may apply to the Court of Session, within twelve months of the date of the judgment, or later with leave of the Court, to have the judgment registered in the Court, and the Court may, subject to certain safeguards, order the judgment to be registered.<sup>2</sup> When the judgment has been registered it has the same effect as if it had been originally obtained in the Court of Session, and the Court has the same control over it, so far as relates to execution, as it has over similar judgments given by itself.<sup>3</sup> The Court has power to make rules, *inter alia*, for suspending the execution of a judgment until the expiration of the period during which the judgment debtor may apply to have the registration set aside.<sup>4</sup>

SUBSECTION (3).—*Under the Inferior Courts Judgments Extension Act, 1882.*

**1442.** In order to do diligence upon certificates of judgments of inferior Courts in England and Ireland which have been registered in Scottish Sheriff Court books under the Inferior Courts Judgments Extension Act, 1882,<sup>5</sup> it is unnecessary to obtain an extract. An attestation by the sheriff-clerk appended to the certificate and note of presentation is sufficient warrant.<sup>6</sup>

## SECTION 11.—EXTRACTS OF REGISTERED DEEDS.

**1443.** When private deeds have been registered in public records, certified copies of them, authenticated by the proper official, are known as extracts. Certain deeds can be recorded in a public register and then taken away, and an extract of such a deed may be given out by the officer in charge of the register, the extract in these cases being a copy made, not from the principal deed, which has been returned to its owner, but from the transcript which was made in the books of the register when the deed was recorded. Others, including all deeds registered in the Books of Council and Session (unless authorised by the Court to be given out) and deeds registered in the Register of Sasines for preservation as well as for publication, are retained.<sup>7</sup> Private deeds may be recorded (1) for preservation, (2) for preservation and execution, (3) for publication; and extracts can be obtained from the keepers of the registers. If a deed relating to land is recorded for

<sup>1</sup> 10 & 11 Geo. V. c. 81.<sup>2</sup> *Ibid.*, s. 9 (1).<sup>3</sup> *Ibid.*, s. 9 (3).<sup>4</sup> *Ibid.*, s. 9 (4) (c).<sup>5</sup> 45 & 46 Vict. c. 31.<sup>6</sup> C.A.S., L. ix. 2.<sup>7</sup> Land Writs Registration (Scotland) Act, 1868 (31 & 32 Vict. c. 64), s. 12; Writs Registration (Scotland) Act, 1868 (31 & 32 Vict. c. 34), s. 1.

publication or for publication as well as for preservation or preservation and execution, the registration is, as a rule, in the Register of Sasines. An extract from a charter in the Register of the Great Seal is a valid warrant for infeftment.<sup>1</sup> If the registration of any deed is for preservation or preservation and execution, it will take place in the Books of Council and Session or Sheriff Court Books. When a deed contains a clause consenting to registration in the Books of Council and Session, the deed may be so registered. An extract of the deed, with a decree of the Court added in terms of the consent to registration, will be given out by the keeper of the books. It has the effect of a decree of Court, and is a sufficient warrant for diligence. The Writs Execution (Scotland) Act, 1877,<sup>2</sup> provided that extracts of writs containing a clause of registration for preservation and execution and registered in the Books of Council and Session or in Sheriff Court Books should contain a warrant for execution, and specified the diligence competent thereon. A schedule to the Act gave a short form of extract. See REGISTRATION. Extracts may also be obtained from registers of births, marriages, and deaths of entries in them, and such extracts, when issued by the proper officer, are admissible as evidence.<sup>3</sup>

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<sup>1</sup> *Mackenzie v. Munro*, 1869, 7 M. 676.

<sup>2</sup> 40 & 41 Vict. c. 40.

<sup>3</sup> Registration of Births, Deaths, and Marriages (Scotland) Act, 1854 (17 & 18 Vict. c. 80), s. 58.

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## EXTRACT OF DEED.

*See* EXTRACT: REGISTRATION.

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## EXTRACTOR.

*See* COURT OF SESSION; EXTRACT; TEINDS.



# EXTRADITION.

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## SECTION 1.—DEFINITION.

**1444.** Extradition is the surrendering to a foreign state of a person accused or convicted of the commission of a crime within the jurisdiction of such State.<sup>1</sup> Fugitive criminals who have fled to a British possession, or to a foreign country in which the King has jurisdiction, and to which the procedure has been applied by an Order in Council, are recovered under the provisions of the Fugitive Offenders Acts 1881<sup>2</sup> and 1915.<sup>3</sup>

## SECTION 2.—HISTORY.

**1445.** Authority has been much divided on the question whether, apart from convention, extradition is legally obligatory. The preponderance of opinion inclines to the view that it is not.<sup>4</sup> This view has been endorsed judicially in the United States in a decision<sup>5</sup> which has been commented on with approval in England.<sup>6</sup> The requirement of reciprocity, a feature peculiarly distinctive of British extradition law,<sup>7</sup> indicates that in this country the duty of extradition is regarded as dependent solely on convention.

**1446.** The practice of surrendering criminals, especially for political offences,<sup>8</sup> may be traced to early times. It existed under the Romans,<sup>9</sup> and between England and Scotland there is to be found an extradition

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GENERAL AUTHORITIES.—Piggott, *Extradition*, 1910; Clarke, *Extradition* (4th ed.), 1903.

<sup>1</sup> Preamble, 33 & 34 Vict. c. 52.      <sup>2</sup> 44 & 45 Vict. c. 69.      <sup>3</sup> 5 & 6 Geo. V. c. 39.

<sup>4</sup> Hall, *International Law*, 8th ed. (1924), pp. 68–69; Piggott, p. 14.

<sup>5</sup> *U.S. v. Rauscher*, 12 Davis (U.S.), 407.

<sup>6</sup> *In re Woodall*, 1888, 57 L.J. M.C. 72, per Lord Coleridge C.J. at p. 74.

<sup>7</sup> *Journal du Droit International Privé*, liii., 1926, p. 897.

<sup>8</sup> Extradition for political offences is now generally abandoned. *Vide para. 1448, infra*, for provisions in Extradition Acts. The attempt to secure from Holland the extradition (under Article 227 of the Treaty of Versailles) of the Emperor William II. failed, because the offence with which he was charged was not a Dutch extradition crime, and was merely political: Hall, *International Law*, 8th ed., 1924, p. 69; *American Journal of International Law*, xiv. p. 91.

<sup>9</sup> Clarke, *Extradition*, 4th ed., c. ii; Forsyth, *Cases, etc.*, in *Constitutional Law*, p. 371; *vide Juridical Review*, viii. 297.

treaty, dated 1174.<sup>1</sup> In the Laws of the Marches between England and Scotland,<sup>2</sup> there occur extradition provisions in embryo, by which a criminal crossing the Border was to be given up, if apprehended before he obtained the peace of the kingdom. In 1612 a Scots Extradition Act<sup>3</sup> was passed, but declared to be of no effect if a similar Act was not passed in the first Session of the English Parliament; but no such Act was passed. Modern extradition law is a growth of the last century. The growth is due, not to increasing recognition of a duty to extradite criminals, but to the increasing convenience of doing so; owing to modern facilities of travel, no state can allow its territory to harbour foreign criminals, or the permission is abused.<sup>4</sup>

### SECTION 3.—SCHEME OF PRESENT LAW.

**1447.** Extradition is now regulated by the Extradition Acts, 1870 to 1906.<sup>5</sup> Where an "arrangement"<sup>6</sup> has been made with any foreign state for the surrender to such state of any fugitive criminal, the Extradition Acts may be applied (subject to such conditions and qualifications as may be deemed expedient) by Order in Council to such foreign state.<sup>7</sup> The Order applying the Acts must recite the

<sup>1</sup> Clarke, Extradition, p. 18.

<sup>2</sup> Thomson's Acts, i. 414, 416.

<sup>3</sup> 1612, c. 2.

<sup>4</sup> *Vide* with regard to Argentina, Correspondence respecting the Extradition of Jabez S. Balfour, Argentine Republic, No. 1, 1893 (1893-4: C.M.D. 7034).

<sup>5</sup> 1870, 33 & 34 Vict. c. 52; 1873, 36 & 37 Vict. c. 60; 1895, 58 & 59 Vict. c. 33; 1906, 6 Edw. VII. c. 5.

<sup>6</sup> The term used throughout the Acts for an Extradition Treaty or Convention.

<sup>7</sup> 1870 Act, s. 2; Orders applying Extradition Acts in consequence of arrangements made with foreign states (for the arrangements, see recitals to Orders):—

Argentine Republic, 1894, Jan. 29 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 1); Austria, 1874, Mar. 17 (*ibid.* p. 11); 1902, Sept. 15 (*ibid.* p. 18); Belgium, 1902, Mar. 6 (*ibid.* p. 20); 1907, July 6 (S. R. & O. 1907, No. 544); 1911, Aug. 8 (S. R. & O. 1911, No. 793); 1924, Jan. 16 (S. R. & O. 1924, No. 81); Bolivia, 1898, Oct. 20 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 32); Brazil, 1873, Nov. 20 (*ibid.* p. 40); Chile, 1898, Aug. 9 (*ibid.* p. 48); Columbia, 1889, Nov. 28 (*ibid.* p. 57); Cuba, 1905, May 10 (S. R. & O. 1905, No. 558); Czechoslovakia, 1926, Nov. 20 (S. R. & O. 1926, No. 1466); Denmark, 1873, June 26 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 66); Ecuador, 1886, June 26 (*ibid.* p. 76); Esthonia, 1926, June 28 (S. R. & O. 1926, No. 840); Finland, 1925, May 2 (S. R. & O. 1925, No. 448); France, 1878, May 16 (S. R. & O. Rev. "Fugitive Criminal," p. 86); 1896, Feb. 22 (*ibid.* p. 97); 1909, Dec. 2 (S. R. & O. 1909, No. 1458); Germany, 1872, June 25 (S. R. & O. Rev. "Fugitive Criminal," p. 100); Greece, 1912, Feb. 13 (S. R. & O. 1912, No. 193); Guatemala, 1886, No. 26 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 112); 1914, Sept. 1 (S. R. & O. 1914, No. 1323); Hayti, 1876, Feb. 5 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 120); Italy, 1873, Mar. 24 (*ibid.* p. 127); Latvia, 1925, October 12 (S. R. & O. 1925, No. 1029); Liberia, 1894, Mar. 10 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 134); Luxemburg, 1881, Mar. 2 (*ibid.* p. 141); Mexico, 1889, April 6 (*ibid.* p. 149); Monaco, 1892, May 9 (*ibid.* p. 158); Netherlands, 1899, Feb. 2 (*ibid.* p. 168); Nicaragua, 1906, May 11 (S. R. & O. 1906, No. 382); Norway, 1873, Sept. 30 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 251); Panama, 1907, Aug. 12 (S. R. & O. 1907, No. 648); Paraguay, 1911, July 5 (S. R. & O. 1911, No. 662); Peru, 1907, May 7 (S. R. & O. 1907, No. 383); Portugal, 1894, Mar. 3 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 180); Rumania, 1894, April 30 (*ibid.* p. 190); Russia, 1887, Mar. 7 (*ibid.* p. 201); Salvador, 1882, Dec. 16 (*ibid.* p. 209); San Marino, 1900, Mar. 3 (*ibid.* p. 218); Siam, 1911, Nov. 10 (S. R. & O. 1911, No. 1151); Spain, 1878, Nov. 27 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 239); 1889, May 28 (*ibid.* p. 249); Sweden, 1873, Sept. 30 (*ibid.* p. 251); 1907, Aug. 12 (S. R. & O. 1907, No. 649); Switzerland, 1881, May 18 (S. R. & O.

arrangement, and after being laid before Parliament, must be published in the London Gazette.<sup>1</sup> The Extradition Acts may also be applied by Order in Council to British possessions.<sup>2</sup> "British possession" means any colony or settlement within H.M. Dominions, exclusive of the United Kingdom, Channel Islands, and Isle of Man.<sup>3</sup> The Irish Free State is now included amongst H.M. Dominions.<sup>4</sup> The Extradition Acts, however, apply to Northern Ireland, as to the remainder of the United Kingdom, and its Parliament is expressly excluded from legislating on extradition.<sup>5</sup>

#### SECTION 4.—EXTRADITION CRIMES.

**1448.** "Extradition crimes," in the case of the United Kingdom, Channel Islands, and Isle of Man, are those crimes which, if committed in England or within English jurisdiction, would be amongst the crimes scheduled to the Acts.<sup>6</sup> They must be crimes both by English and by the foreign law.<sup>7</sup> The following is the statutory list of extradition crimes:—Murder, and attempt and conspiracy to murder; manslaughter; counterfeiting, and altering money and uttering such; forgery, counterfeiting and altering and uttering; embezzlement and larceny; obtaining money or goods by false pretences; crimes by bankrupts against bankruptcy law; fraud by a bailee, banker, agent, factor, trustee, or director or member or public officer of a company, made criminal by any Act of Parliament; rape; abduction; child-stealing; burglary and housebreaking; arson; robbery with violence; threats with intent to extort; piracy; sinking or destroying a vessel at sea, or attempting or conspiring to do so; assaults on board a ship on the high seas with intent to destroy life or do grievous bodily harm; revolt or conspiracy to revolt on high seas against authority of the master; kidnapping and false imprisonment; perjury and subornation of perjury; offences under the Larceny Act, 1861,<sup>8</sup> the Malicious Damage Act, 1861,<sup>9</sup> the Forgery Act, 1861,<sup>10</sup> the Coinage Offences Act, 1861,<sup>11</sup> and the Offences against the Person Act, 1861<sup>12</sup> (which do not apply to Scotland); any indictable offence under the Bankruptcy Acts;<sup>13</sup> bribery;<sup>14</sup> and offences under the Slave Trade Acts.<sup>15</sup> Accessories are liable to be surrendered, tried, and punished as principals.<sup>16</sup> The complete list of crimes scheduled to the

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Rev. 1904, "Fugitive Criminal," p. 255); 1905, May 29 (S. R. & O. 1905, No. 616); Tonga, 1882, Nov. 30 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 268); Tunis, 1890, May 1 (*ibid.* p. 269); 1909, Dec. 2 (S. R. & O. 1909, No. 1458); United States, 1890, Mar. 21 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 271); 1901, June 26 (*ibid.* p. 275); 1907, Feb. 11 (S. R. & O. 1907, No. 110); Uruguay, 1885, Mar. 5 (S. R. & O. Rev. 1904, "Fugitive Criminal," p. 277); 1891, Nov. 24 (*ibid.* p. 288). See Index to Statutory Rules and Orders.

<sup>1</sup> 1870 Act, s. 2.

<sup>2</sup> *Ibid.*, s. 17. For such Orders, see Index to S. R. & O.

<sup>3</sup> *Ibid.*, s. 26.

<sup>4</sup> 13 Geo. V. Sess. 2, c. 1, ss. 3 and 4.

<sup>5</sup> 10 & 11 Geo. V. c. 67, s. 4 (1) (4). For the meaning of "United Kingdom," since the establishment of the Irish Free State, see S. R. & O. 1923, No. 405 (27th Mar. 1923).

<sup>6</sup> 1870 Act, s. 26. <sup>7</sup> *In re Bellencourt*, [1891] 2 Q.B. 122.

<sup>8</sup> 24 & 25 Vict. c. 96.

<sup>9</sup> *Ibid.* c. 97.

<sup>10</sup> *Ibid.* c. 98.

<sup>11</sup> *Ibid.* c. 99.

<sup>12</sup> *Ibid.* c. 100.

<sup>13</sup> See the 1870 Act, First Schedule; 1873 Act, Schedule.

<sup>14</sup> 1906 Act, s. 1.

<sup>15</sup> 5 Geo. IV. c. 113; 6 & 7 Vict. c. 98; 36 & 37 Vict. c. 88, s. 27.

<sup>16</sup> 1873 Act, s. 3.



Extradition Acts is not necessarily included in every arrangement with a foreign state to which Britain is a party.

**1449.** In the case of British possessions, extradition crimes are to be construed according to the law existing there, and not according to the law of England.<sup>1</sup> For Scotland, however, there is no such provision. An offence which is a crime according to Scots, but not according to English law, is not an extradition crime, within the meaning of the Acts.<sup>2</sup> It would thus appear that when an inquiry is held in Scotland under the Act of 1895,<sup>3</sup> the magistrate must decide by the law of England whether the offence is an extradition crime. In the ordinary case there is no difficulty, for the Scottish magistrate merely transmits the accused to London.

**1450.** For political offences there is no extradition. If the offence for which the surrender of a fugitive criminal is demanded is of a political character, or if he proves to the satisfaction of the magistrate before whom he is brought, or to a Secretary of State, that his surrender is really demanded for the purpose of trying or punishing him for such an offence, his surrender is not to be made.<sup>4</sup> On receiving from a foreign state a requisition for a fugitive criminal, the Secretary of State may, if he is of opinion that the offence is of a political character, have the accused discharged, without ordering him to appear before a magistrate.<sup>5</sup> It is the duty of the magistrate before whom a fugitive criminal is brought to receive evidence tendered with a view to showing that the offence for which his surrender is demanded is of a political character.<sup>6</sup> To come within the exception, the offence must be "incidental to and form part of political disturbances";<sup>7</sup> e.g. if there are two "parties in the state, each seeking to impose the government of their own choice on the other."<sup>8</sup> The exception is in favour only of political offences already committed.<sup>9</sup>

**1451.** A fugitive criminal is not to be tried for any other offence than that for which his surrender has been demanded. Thus once surrendered by a foreign state for one extradition crime, he is not, until he has been restored or had an opportunity to return to such foreign state, to be tried for any previous crime "other than such of the said crimes as may be proved by the facts on which the surrender is grounded."<sup>10</sup> Conversely, he is not to be surrendered to a foreign state, unless provision is made by the law of such state, or by arrangement, that he shall not, until he has been restored or had the opportunity of returning to this country, be tried for any previous crime "other than the extradition crime proved by the facts on which his surrender is grounded."<sup>11</sup>

<sup>1</sup> 1870 Act, s. 17.

<sup>2</sup> Piggott, pp. 36, 121.

<sup>3</sup> 1895 Act, s. 1 (2).

<sup>4</sup> 1870 Act, s. 7.

<sup>5</sup> *Ibid.*, s. 3.

<sup>6</sup> *Ibid.*, s. 9.

<sup>7</sup> *In re Castioni*, [1891] 1 Q.B. 149.

<sup>8</sup> *In re Meunier*, [1894] 2 Q.B. 415, at p. 419.

<sup>9</sup> *In re Arton*, [1896] 1 Q.B. 108; where it was argued that extradition was asked with ulterior political motives.

<sup>10</sup> 1870, s. 19.

<sup>11</sup> *Ibid.*, s. 3 (2); *In re Woodall*, 1888, 57 L.J. M.C. 72.

## SECTION 5.—FUGITIVE CRIMINALS.

**1452.** A “fugitive criminal” means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state, who is in, or is suspected of being in, some part of H.M. Dominions.<sup>1</sup> This definition includes subjects both of foreign states and of Britain. Accordingly, the surrender by Britain of her own subjects is not excluded. But if it has been stipulated in a treaty to which Britain is a party that the signatories shall not be bound to surrender their nationals, this stipulation limits the statutes.<sup>2</sup> Otherwise, it is in the discretion of the Secretary of State to surrender a British subject;<sup>3</sup> and he may exercise his right to decline so to surrender at any stage in the proceedings for extradition, and even after giving his final order.<sup>3</sup> *A fortiori*, he may surrender subjects of a third state.<sup>4</sup>

**1453.** The crime must have been committed within the jurisdiction of the foreign state.<sup>5</sup> But a criminal may be surrendered though he never set foot therein;<sup>6</sup> and a crime done in one country, followed by consequences in another, may, if the two are linked by continuing intention, justify the Court in holding that the crime was committed in both countries.<sup>7</sup> A fugitive criminal who has been accused of some offence under English jurisdiction other than that for which surrender is asked, will not be surrendered, until he has been discharged, whether by acquittal or expiry of sentence; nor will a fugitive criminal who is already undergoing sentence under any conviction in the United Kingdom.<sup>8</sup> But a foreign criminal who escapes from imprisonment to the United Kingdom may be extradited, notwithstanding that prison-breach is not an extradition crime, if his imprisonment was upon conviction for an extradition crime.<sup>9</sup>

**1454.** In some foreign countries there is a prescriptive period fixed, after the elapse of which punishment for a crime is no longer competent. This occasionally leads to difficulties being raised in extradition cases. It has now been laid down that where a fugitive criminal has, within the prescriptive period, been committed to await the warrant for surrender, but actual surrender has been delayed until after the lapse of the prescriptive period, in consequence of the criminal being incarcerated in respect of a crime committed in Britain, the period of detention under the British sentence does not count as part of the prescriptive period, so as to free the criminal from extradition and trial upon the foreign charge.<sup>10</sup>

<sup>1</sup> 1870 Act, s. 26.

<sup>2</sup> *R. v. Wilson*, 1877, 3 Q.B.D. 42.

<sup>3</sup> *In re Galwey*, [1896] 1 Q.B. 230.

<sup>4</sup> *R. v. Ganz*, 1882, 9 Q.B.D. 93.

<sup>5</sup> *R. v. Lavaudier*, 1881, 15 Cox C.C. 329.

<sup>6</sup> *R. v. Nillins*, 1884, 53 L.J. M.C. 157; *R. v. Godfrey*, [1923] 1 K.B. 24.

<sup>7</sup> *R. v. Keyn*, 1876, 2 Ex. D. 63, per Cockburn C.J. at p. 232.

<sup>8</sup> 1870 Act, s. 3 (3).

<sup>9</sup> *Ex parte Moser*, [1915] 2 K.B. 698.

<sup>10</sup> *Ex parte Van der Auvera*, [1907] 2 K.B. 157; *Ex parte Calberla*, [1907] 2 K.B. 861.

## SECTION 6.—PROCEDURE IN UNITED KINGDOM.

**1455.** London is the extraditing centre for the whole of the United Kingdom. On the requisition of a diplomatic representative of a foreign state (which term includes a recognised consul-general, and consular officers recognised by the governors of British possessions),<sup>1</sup> a Secretary of State may issue an order<sup>2</sup> to a police magistrate, signifying that such requisition has been made and requiring him to issue his warrant for the apprehension of the fugitive criminal.<sup>3</sup> "Police magistrate" means a magistrate of the metropolitan police court in Bow Street.<sup>4</sup> The warrant is issued by the police magistrate on the receipt of the Order, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England.<sup>5</sup> This warrant runs in Scotland without endorsement.<sup>6</sup>

**1456.** The prisoner is brought on this warrant before the police magistrate, who after being satisfied: (1) that the crime is not of a political character, and is an extradition crime;<sup>7</sup> (2) that the foreign warrant<sup>8</sup> authorising the arrest is duly authenticated; and (3) that such evidence is produced as would, in England, justify him in committing the prisoner,<sup>9</sup> commits him to a Middlesex prison to await surrender to the foreign state, on a warrant from the Secretary of State, and at the same time sends to the Secretary of State a certificate of his commitment, and such further report as he thinks necessary.<sup>10</sup> If the police magistrate is not satisfied that he can commit the prisoner, his duty is to order his discharge.<sup>10</sup> In order to satisfy himself that the surrender of the prisoner is asked for an extradition crime, the police magistrate should have formal proof of the Order in Council applying the Acts to the foreign state making the requisition; though his failure to do so may not invalidate the warrant for commitment.<sup>11</sup> Where the Order recites a bilingual arrangement, the magistrate looks only at the English version,<sup>12</sup> but the arrangement ought to receive a liberal interpretation.<sup>13</sup> It is not essential to the validity of a requisition or the warrant for commitment following thereon that the procedure before the foreign magistrate was regular; *e.g.* the absence of sworn depositions before a French magistrate did not entitle the police magistrate to discharge the prisoner.<sup>14</sup> But in the proceedings before the police magistrate, foreign

<sup>1</sup> 1873 Act, s. 7.<sup>2</sup> 1870 Act, 2nd Schedule.<sup>3</sup> *Ibid.*, s. 7.<sup>4</sup> *Ibid.*, s. 26.<sup>5</sup> *Ibid.*, s. 8 (1).<sup>6</sup> *Ibid.*, s. 13.<sup>7</sup> *Ibid.*, s. 9.

<sup>8</sup> The foreign warrant need not specify the crime in the correct English form: *In re Bellencontre*, [1891] 2 Q.B. 122; *In re Pariso*, 1889, 5 T.L.R. 344; *Ex parte Terraz*, 1878, 4 Ex. D. 63; the nature of the crime is to be ascertained from the facts in the accompanying depositions: *Ex parte Piot*, 1883, 48 L.T. (N.S.) 120.

<sup>9</sup> *R. v. Finkelstein*, 1886, 16 Cox C.C. 107 (extradition under wrong name).<sup>10</sup> *Ibid.*, s. 10.<sup>11</sup> *Ex parte Servini*, [1914] 1 K.B. 77.<sup>12</sup> *Ex parte Mehamed Ben Romdan*, [1912] 3 K.B. 190.<sup>13</sup> *In re Arton* (No. 2), [1896] 1 Q.B. 509, per Lord Russell C.J. at p. 517.<sup>14</sup> *Ex parte Thompson*, [1911] 2 K.B. 82.



depositions and warrants may be received in evidence only when authenticated as provided for by the Acts.<sup>1</sup> When a police magistrate commits a prisoner, he must inform him that he will not be surrendered until after fifteen days, and that he has the right to apply for a writ of *habeas corpus*.<sup>2</sup> After committing the prisoner, the police magistrate is *functus officio*.<sup>3</sup>

**1457.** During the fifteen days following final commitment, the fugitive criminal may apply for a writ of *habeas corpus*, when the Court may set him at liberty.<sup>4</sup> The sole question on *habeas corpus* is the unlawfulness of the custody. The Court does not review the magistrate's decision, except "in the sense of determining whether there was evidence enough to give him jurisdiction to make the order for committal."<sup>5</sup> Even on the ground of *res noviter*, there is no review, except through the Secretary of State.<sup>6</sup> From the decision of the Court on the writ of *habeas corpus*, no appeal lies to the Court of Appeal.<sup>7</sup>

**1458.** The final surrender to the foreign state is by warrant of the Secretary of State, who may also at any time order the prisoner's discharge.<sup>8</sup> Surrender of the prisoner cannot be made till after the expiry of fifteen days from his final commitment.<sup>9</sup> If he is not surrendered and conveyed out of the United Kingdom within two months of commitment, he may be discharged on application to the Court;<sup>10</sup> this period of two months runs not from commitment on apprehension, but from commitment after the prisoner has been brought before the police magistrate.<sup>11</sup> By certain treaties, *e.g.* that with Germany, it is provided that if the fugitive criminal is not committed for surrender within two months of arrest, he shall be set at liberty. In a case where there was in fact upon the depositions evidence to justify commitment, prior to the expiry of the two months, but extradition was delayed for the investigation of fresh charges against the fugitive, he was held not to be entitled to liberation.<sup>12</sup>

**1459.** Special procedure is provided for the case where a fugitive criminal, duly apprehended, is in such a condition that it may be dangerous to his life or prejudicial to his health to remove him to Bow Street. On representation being made by or on behalf of the fugitive criminal, the Secretary of State may direct his case to be heard before a magistrate at the place of apprehension or detention.<sup>13</sup> In Scotland such magistrate may be a sheriff or sheriff-substitute, who for this purpose is deemed to be a police magistrate within the meaning of the Acts.<sup>14</sup> If after committing him to prison this magistrate thinks that it may be dangerous to his life or prejudicial to his health to remove him

<sup>1</sup> 1870 Act, ss. 14, 15.

<sup>2</sup> *Ibid.*, s. 11.

<sup>3</sup> *Ex parte Otto*, [1894] 1 Q.B. 420.

<sup>4</sup> *The Queen v. Portugal*, 1885, 16 Q.B.D. 487.

<sup>5</sup> *In re Galwey*, [1896] 1 Q.B. 230, per Lord Russell C.J. at p. 236; *R. v. Maurer*, 1883, 10 Q.B.D. 513.

<sup>6</sup> *Ex parte Perry*, [1924] 1 K.B. 455.

<sup>7</sup> *Ex parte Woodhall*, 1888, 20 Q.B.D. 832.

<sup>8</sup> 1870 Act, s. 11.

<sup>9</sup> *Ibid.*, s. 3 (4).

<sup>10</sup> *Ibid.*, s. 12.

<sup>11</sup> *Ex parte Mehamed Ben Romdan*, [1912] 3 K.B. 190.

<sup>12</sup> *In re Bluhm*, [1901] 1 K.B. 764.

<sup>13</sup> 1895 Act, s. 1 (1).

<sup>14</sup> *Ibid.*, s. 1 (2).

there, he may put him in custody at the place where he for the time being is.<sup>1</sup>

**1460.** A warrant for the apprehension of a fugitive criminal may also be issued by a magistrate without order from a Secretary of State, on such information as would justify him in issuing a warrant, if the crime had been committed, or the criminal convicted, within his own jurisdiction.<sup>2</sup> This power may be exercised not merely by a police magistrate, but also, in Scotland, by a sheriff, sheriff-substitute, magistrate, or justice of the peace.<sup>3</sup> The magistrate reports the issue of the warrant together with the information in support of it, to a Secretary of State, who may cancel the warrant, and discharge the prisoner. The criminal, when apprehended, is brought before some magistrate having power to issue such warrant, who orders him to be brought before a police magistrate. The duty of the police magistrate is to discharge the prisoner, unless he receives from a Secretary of State, within such reasonable time as he may fix, an order stating that a requisition for the prisoner's surrender has been made.<sup>4</sup>

#### SECTION 7.—PROCEDURE IN FOREIGN COUNTRY.

**1461.** To procure the surrender of a fugitive criminal for trial in the Scottish Courts, the Lord Advocate communicates through the Home Secretary with the Foreign Secretary, who communicates through the British Diplomatic Agent with the Foreign Government, in accordance with the provisions of the special treaty. The documents required, and other matters, are similar to those fully explained elsewhere, in regard to the recovery of fugitive criminals from British possessions, and need not be here repeated. See CRIME (CRIMINAL ADMINISTRATION).

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<sup>1</sup> 1895 Act, s. 1 (3).

<sup>2</sup> 1870 Act, s. 8 (2).

<sup>3</sup> *Ibid.*, ss. 8 (2), 26.

<sup>4</sup> *Ibid.*, s. 8.

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## EXTRINSIC.

See ADMISSIONS AND CONFESSIONS; OATH ON  
REFERENCE.

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